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Rule 145: Mergers, Acquisitions and Recapitalizations Under the Securities Act of 1933

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Rule 145: Mergers, Acquisitions and Recapitalizations Under the Securities Act of 1933

Cover Page Footnote

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RULE 145: MERGERS, ACQUISITIONS AND RECAPITALIZATIONS UNDER THE SECURITIES ACT OF 1933

RUTHEFORD B CAMPBELL, JR.*

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INTRODUCTION

THE most significant occurrence surrounding the adoption of Rule 145¹ (the "Rule") was the repeal by the Securities and Exchange

1. Rule 145 provides:

(a) *Transactions within this section.* An "offer," "offer to sell," "offer for sale," or "sale" shall be deemed to be involved, within the meaning of section 2(3) of the Act, so far as the security holders of a corporation or other person are concerned where, pursuant to statutory provisions of the jurisdiction under which such corporation or other person is organized, or pursuant to provisions contained in its certificate of incorporation or similar controlling instruments, or otherwise, there is submitted for the vote or consent of such security holders a plan or agreement for:

(1) *Reclassifications.* A reclassification of securities of such corporation or other person, other than a stock split, reverse stock split, or change in par value, which involves the substitution of a security for another security;

(2) *Mergers or Consolidations.* A statutory merger or consolidation or similar plan or acquisition in which securities of such corporation or other person held by such security holders will become or be exchanged for securities of any person, unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States; or

(3) *Transfers of assets.* A transfer of assets of such corporation or other person, to another person in consideration of the issuance of securities of such other person or any of its affiliates, if:

(i) Such plan or agreement provides for dissolution of the corporation or other person whose security holders are voting or consenting; or

(ii) Such plan or agreement provides for a pro rata or similar distribution of such securities to the security holders voting or consenting; or

(iii) The board of directors or similar representatives of such corporation or other person, adopts resolutions relative to paragraph (a)(3) (i) or (ii) of this section within 1 year after the taking of such vote or consent; or

(iv) The transfer of assets is a part of a preexisting plan for distribution of such securities, notwithstanding paragraph (a)(3) (i), (ii), or (iii) of this section.

(b) *Communications not deemed to be a "Prospectus" or "Offer to Sell".* For the purpose of this section, the term "prospectus" as defined in section 2(10) of the Act and the term "offer to sell" in Section 5 of the Act shall not be deemed to include the following:

(1) Any written communication or other published statement which contains no more than the following information: The name of the issuer of the securities to be offered, or the person whose assets are to be sold in exchange for the securities to be offered, and the names of other parties to any transaction specified in paragraph (a) of this section; a brief description of the business of parties to such transaction; the date, time, and place of the meeting of security holders to vote on or consent to any such transaction specified in paragraph (a) of this section; a brief description of the transaction to be acted upon and the basis upon which such transaction will be made; and any legend or similar statement required by State or Federal law or administrative authority.

(2) Any written communication subject to and meeting the requirements of paragraph (a) of § 240.14a-12 [Rule 14a-12 under the

Commission (the "Commission" or the "staff") of Rule 133,² the con-

Securities Exchange Act of 1934] of this chapter and filed in accordance with paragraph (b) of that section.

(c) *Persons and parties deemed to be underwriters.* For purposes of this section, any party to any transaction specified in paragraph (a) of this section, other than the issuer, or any person who is an affiliate of such party at the time any such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of section 2(11) of the Act. The term "party" as used in this paragraph (c) shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.

(d) *Resale provisions for persons and parties deemed underwriters.* Notwithstanding the provisions of paragraph (c), a person or party specified therein shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of registered securities acquired in a transaction specified in paragraph (a) of this section if:

(1) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f) and (g) of § 230.144 [Rule 144];

(2) Such person or party is not an affiliate of the issuer and has been the beneficial owner of the securities for at least two years as determined in accordance with paragraph (d) of § 230.144 [Rule 144], and the issuer meets the requirements of paragraph (c) of § 230.144 [Rule 144]; or

(3) Such person or party is not, and has been for at least three months, an affiliate of the issuer and has been the beneficial owner of the securities for at least three years as determined in accordance with paragraph (d) of § 230.144 [Rule 144].

(e) *Definition of "Person."* The term "person" as used in paragraphs (c) and (d) of this section, when used with reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of § 230.144 [Rule 144 under the Act].

17 C.F.R. § 230.145 (1987).

2. Rule 133 provided:

(a) For purposes only of section 5 of the Act, no "sale," "offer to sell," or "offer for sale" shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the state of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or securities of a corporation which owns stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of such person, under such circumstances that the vote of a required favorable majority (1) will operate to authorize the proposed transaction as far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (2) will bind all stockholders of such corporation except to the extent that dissenting shareholders might be entitled, under statutory provisions or provisions

contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

(b) Any person who purchases securities of the issuer from security holders of a constituent corporation with a view to, or offers or sells such securities for such security holders in connection with, a distribution thereof pursuant to any contract or arrangement, made in connection with any transaction specified in paragraph (a) of this section, with the issuer or with any affiliate of the issuer, or with any person who in connection with such transaction is acting as an underwriter of such securities, shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act. This paragraph does not refer to arrangements limited to provision for the matching and combination of fractional interests in securities into whole interests, or the purchase and sale of such fractional interests, among security holders of the constituent corporation and to the sale on behalf of, and as agent for, such security holders of such number of fractional or whole interests as may be necessary to adjust for any remaining fractional interests after such matching.

(c) Any constituent corporation, or any person who is an affiliate of a constituent corporation at the time any transaction specified in paragraph (a) of this section, is submitted to a vote of the stockholders of such corporation, who acquires securities of the issuer in connection with such transaction with a view to the distribution thereof shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act. A transfer by a constituent corporation to its security holders of securities of the issuer upon a complete or partial liquidation shall not be deemed a distribution for the purpose of this paragraph.

(d) Notwithstanding the provisions of paragraph (c) of this section, a person specified therein shall not be deemed to be an underwriter nor to be engaged in a distribution with respect to securities acquired in any transaction specified in paragraph (a) of this section, which are sold by him in brokers' transactions within the meaning of section 4(4) of the Act, in accordance with the conditions and subject to the limitations specified in paragraph (e) of this section, if such person—

(1) Does not directly or indirectly solicit or arrange for the solicitation or orders to buy in anticipation of or in connection with such brokers' transactions;

(2) Makes no payment in connection with the execution of such brokers' transactions to any person other than the broker; and

(3) Limits such brokers' transactions to a sale or series of sales which, together with all other sales of securities of the same class by such person or on his behalf within the preceding six months, will not exceed the following:

(i) If the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions, or

(ii) If the security is admitted to trading on a securities exchange, the lesser of approximately *a* one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or *b* the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.

(e) For the purposes of paragraph (d) of this section:

(1) The term "brokers' transactions" in section 4(4) of the Act shall be deemed to include transactions by a broker acting as agent for the account of the seller where (i) the broker performs no more than the usual and customary broker's functions, (ii) the broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or

ceptually deficient "no-sale" rule³ that had perplexed commentators for years. In Rule 133, the Commission took the position that no offer or sale of a security was involved when, for example, a shareholder of a company to be acquired in a merger (an "acquired company")⁴ voted whether to authorize the merger of the acquired company into an acquiring company (an "acquiring company")⁵ in exchange for stock in the acquiring company.

It is clear, however, that shareholders of an acquired company make significant investment decisions when they vote on such a merger, and, as a result, it may be appropriate to subject such transactions to the disclosure requirements of the Securities Act of 1933 (the "1933 Act").⁶ Without disclosure, the shareholders of the acquired company are unable to determine whether the proposed merger and the proffered stock in the acquiring company constitute a fair deal.⁷

Although the Commission could have concluded its work by merely

customary broker's commissions, (iii) the broker does not solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such transactions and (iv) the broker is not aware of any circumstances indicating that his principal is failing to comply with the provisions of paragraph (d) of this section;

(2) The term "solicitation of such orders" in section 4(4) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security;

(3) Where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of an offer to sell such security, the term "solicitation" in section 4(4) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation.

(f) For the purposes of this rule, the term "constituent corporation" means any corporation, other than the issuer, which is a party to any transaction specified in paragraph (a) of this section. The term "affiliate" means a person controlling, controlled by or under common control with a specified person.

17 C.F.R. § 230.133 (1971), rescinded 37 Fed. Reg. 23, 636 (1972).

3. For a description of Rule 133, its history and defects, see 1 L. Loss, *Securities Regulation* 518-42 (2d ed. 1961).

4. For purposes of this Article, the term "acquired company" refers to a non-surviving entity in a merger or consolidation or an entity that sells its assets in exchange for the stock of another party.

5. For purposes of this Article, the term "acquiring company" refers to the surviving entity in a merger or consolidation, an entity that purchases the assets of another entity or an entity that exchanges its securities with its existing security holders.

6. There exists a body of scholarship that rejects the need for governmentally imposed disclosure rules. See, e.g., R. Posner, *Economic Analysis of Law* 332 (2d ed. 1977). While this scholarship may be persuasive, this Author has elected not to discuss such matters in this Article. Instead, it is written from the premise, *arguendo*, that it is appropriate to force disclosure, but that such rules should be reasonable, clearly promulgated and consistently applied.

7. There are governmental rules that may require disclosure in certain amalgamations and recapitalizations. For example, when an acquired company that is registered under the Securities Exchange Act of 1934 (the "1934 Act") solicits proxies in connection with a merger, a proxy statement must be provided to the shareholders. See 17 C.F.R. § 240.14a-3 (1987). The federal proxy rules would not be applicable, however, if the acquired company were not reporting under the 1934 Act.

repealing Rule 133,⁸ it chose, instead, to enact a series of special provisions regarding amalgamations and recapitalizations and, therefore, promulgated Rule 145. Section (a) of Rule 145 provides that an "offer" and a "sale" of securities is involved when shareholders vote on certain amalgamations and recapitalizations, provided the shareholders are to receive new securities under the plan ("Rule 145 transactions").⁹ Section (b) of Rule 145 permits certain announcements of a proposed Rule 145 transaction without the announcement's being deemed to constitute an offer.¹⁰ Section (c) defines certain persons participating in a Rule 145 transaction as "underwriters" ("Rule 145 underwriters"),¹¹ and section (d) of the Rule provides special resale provisions for these Rule 145 underwriters.¹²

Since the adoption of Rule 145, the Commission has promulgated one major interpretative release¹³ and nearly seven hundred no-action letters on the Rule. In the interpretative release and no-action letters, the Commission has faced, as one would imagine, numerous and difficult issues. Unfortunately, the Commission has not always responded in a consistent and logical manner. As a result, the Rule, as interpreted, is unnecessarily complex and confusing, and in certain aspects conceptually flawed.

The purpose of this Article is twofold. First, the Article presents an analysis of the present status of Rule 145 as it developed through the Commission's nearly seven hundred no-action letters. Part I analyzes how the Rule is applied to various types of transactions by issuers, and Part II analyzes the effect that Rule 145 has on resales of stock originally acquired in a transaction that fell within Rule 145. In both parts the Article suggests alternatives where interpretations of the Rule are confusing, inappropriate or nonexistent. In conclusion, the Article discusses broader policy matters and suggests certain changes that the Commission should make regarding the text and development of Rule 145.

I. SALES AND NO-SALES BY ISSUERS

A. *Generally*

A continuing source of interpretative difficulty for the Commission is the question of when corporate amalgamations and recapitalizations involve

8. Since Rule 133 provided an exception for certain securities from registration under the 1933 Act, see *supra* note 2, repeal of the Rule would subject those securities to the registration requirements.

9. For the text of Rule 145(a), see *supra* note 1.

10. For the text of Rule 145(b), see *supra* note 1.

11. For the text of Rule 145(c), see *supra* note 1.

12. For the text of Rule 145(d), see *supra* note 1.

13. Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-3 (Feb. 28, 1974). Resale of Restricted and Other Securities, Interpretations of Rules, Release No. 33-6099, 1 Fed. Sec. L. Rep. (CCH) ¶ 2705H, at 2819-3 (Aug. 2, 1979) also addressed some Rule 145 problems.

an "offer"¹⁴ or a "sale"¹⁵ of securities (for simplicity, this will often be referred to only in terms of whether a sale is involved in a Rule 145 transaction). This is a critical decision of course, because if the transaction involves no sale, it is not subject to the disclosure requirements of the 1933 Act.

Under the provisions of Rule 145(a), the acquiring company makes an offer and sale of its securities to the shareholders of the acquired company when the acquired company shareholders vote on a plan for merger, consolidation¹⁶ or the sale of assets¹⁷ under the terms of which they are to receive securities of the acquiring company. Also, under Rule 145(a), single company recapitalizations involve the offer and sale of securities to voting shareholders who receive the "substitution of a security for another security."¹⁸

In each of the foregoing situations, shareholders typically make material investment decisions, deciding in the case of single company recapitalizations whether to accept changes in the contractual rights they enjoy, and deciding in the case of mergers, consolidations and sales of assets whether to accept new contractual rights and new assets against which they will have claims. The Commission, therefore, properly con-

14. The 1933 Act defines an "offer" as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(3) (1982).

15. The 1933 Act defines a "sale" as "every contract of sale or disposition of a security or interest in a security, for value." 15 U.S.C. § 77b(3) (1982).

16. Rule 145(a)(2) covers mergers and consolidations. For the text of Rule 145(a)(2), see *supra* note 1.

Courts consistently have held that mergers involve the sale of securities. See, e.g., SEC v. National Sec., Inc., 393 U.S. 453 (1969); Swanson v. American Consumer Indus., 415 F.2d 1326, 1330 (7th Cir. 1969); Mader v. Armel, 402 F.2d 158, 161 (6th Cir. 1968); Dasho v. Susquehanna Corp., 380 F.2d 262, 267 (7th Cir. 1967); Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. 66, 103-04 (E.D.N.Y. 1969); Simon v. New Haven Bd. & Carton Co., 250 F. Supp. 297, 299 (D. Conn. 1966); H. L. Green Co. v. Childree, 185 F. Supp. 95, 96 (S.D.N.Y. 1960).

17. Rule 145(a)(3) covers sales of assets. For the text of Rule 145(a)(3), see *supra* note 1.

18. 17 C.F.R. § 230.145(a)(1) (1987). For the text of Rule 145(a)(1), see *supra* note 1.

Typically, these transactions are accomplished by amendments to the company's articles of incorporation. Such changes are specifically authorized by state corporate laws. See, e.g., Model Business Corp. Act § 58 and state statutes adopting § 58 cited in ¶ 6 thereafter (2d ed. 1971 & Supp. 1973 & 1977); see also 3 Model Business Corp. Act Annotated § 10.01 and state statutes cited thereafter (3d ed. 1987). For examples of cases in which the rights of preferred shareholders were altered by amendments to a company's articles of incorporation, see Bailey v. Tubize Rayon Corp., 56 F. Supp. 418, 419 (D. Del.), *aff'd*, 145 F.2d 700 (1944); Barrett v. Denver Tramway Corp., 53 F. Supp. 198, 199 (D. Del.), *aff'd*, 146 F.2d 701 (3d Cir. 1944); Western Foundry Co. v. Wicker, 403 Ill. 260, 264, 85 N.E.2d 722, 724 (1949); State ex rel. Weede v. Bechtel, 239 Iowa 1298, 1304, 31 N.W.2d 853, 856 (1948), *cert. denied*, 337 U.S. 918 (1949); Franzblau v. Capital Sec. Co., 2 N.J. Super. 517, 522, 64 A.2d 644, 645-46 (Ch. Div. 1949); Wessel v. Guantamano Sugar Co., 134 N.J. Eq. 271, 272, 35 A.2d 215, 216 (N.J. Ch.), *aff'd*, 135 N.J. Eq. 506, 39 A.2d 431 (1944) (*per curiam*); Kamena v. Janssen Dairy Corp., 133 N.J. Eq. 214, 215, 31 A.2d 200, 201 (N.J. Ch. 1943), *aff'd*, 134 N.J. Eq. 359, 35 A.2d 894 (N.J. Ch. 1944) (*per curiam*).

cluded that these four types of transactions should be considered as offers and sales of securities to the shareholders of the acquired company and thus should be subjected to the disclosure requirements of the 1933 Act.

B. *Specific Transactions and Issues*

1. Generally

The apparent clarity of Rule 145(a),¹⁹ which defines transactions falling within the Rule, is entirely deceiving, however, because not all reclassifications, mergers, consolidations or sales of assets involve the sale of securities. The test should be whether the voting shareholders, who are asked to approve the proposed amalgamation or recapitalization and are to receive securities in the deal, are making a material investment decision. When the voting shareholders make a material investment decision, they need the protection of the 1933 Act, and, accordingly, the transaction should be considered a sale of securities to the voting shareholders. The Commission, however, has had difficulty implementing this concept.

2. Stock Splits

Rule 145(a) exempts reclassifications in the form of a "stock split, reverse stock split, or change in par value"²⁰ from the definition of "sale." Apparently, the Commission considers these transactions to involve only immaterial changes in the investment contracts of the shareholders and not, therefore, an appropriate point to require disclosure.

In one instance, however, a reverse stock split may involve a material change in the rights of shareholders, making it unwise to assume that no sale is involved. The particular transaction involves the use of a reverse stock split to freeze out small or minority shareholders. For example, shareholders may be asked to approve a reverse stock split of significant proportions, under the terms of which shareholders who would receive less than one share are relegated to cash in lieu of a fractional share.²¹

In such transactions, voting shareholders who are relegated to cash present no registration problem for the company under the 1933 Act because they are not purchasing any securities from the company.²² Shareholders who receive stock in that transaction, however, may pose 1933 Act problems for the company, because, arguably at least, they are vot-

19. See 17 C.F.R. § 230.145(a) (1987). For the text of Rule 145(a), see *supra* note 1.

20. For the text of Rule 145(a)(1), see *supra* note 1.

21. Under the provisions of the Model Business Corporation Act, a corporation is authorized to pay cash to shareholders in lieu of issuing fractional shares that such shareholders may otherwise be entitled to receive. See Model Business Corp. Act § 24 (2d ed. 1971).

22. Such shareholders, however, would be selling their securities and thus be protected by the antifraud provisions of the 1933 and 1934 Acts. See 15 U.S.C. § 78j(b) (1982) (Section 10b of the 1934 Act); 17 C.F.R. § 240.10b-5 (1987) (promulgated under § 10b of the 1934 Act).

ing to receive a materially changed investment contract.²³ Specifically, the shareholders remaining after the transaction will have a greater interest in the company, which changes their rights of control and rights to participate in dividends and liquidation. The company also could have a dramatically changed balance sheet, as the company must either decrease assets or increase liabilities in order to pay for the freeze-out, and it may no longer be subject to reporting requirements under the 1934 Act.²⁴

Voting on such a proposed reverse stock split might, therefore, involve a material investment decision for the shareholders who receive stock in the transaction. Accordingly, one should be wary of concluding that reverse stock splits, which clearly come within the letter of the exception of Rule 145(a)(1), necessarily involve no sale of a security.

3. Change-in-Domicile Exception

Under Rule 145(a)(2),²⁵ the merger of an acquired company into the acquiring company, under the terms of which the shareholders of the acquired company receive stock of the acquiring company (a "stock-for-stock merger") involves no sale of securities to the shareholders of the acquired company, if "the sole purpose of the transaction is to change the issuer's domicile solely within the United States."²⁶ If, therefore, the merger meets the "sole purpose" criterion, it may be completed without registration or the need to qualify for an exemption from the registration provisions of the 1933 Act.²⁷

The availability of the change-in-domicile exception depends upon the absence of any material change in shareholder rights. Thus, if the merger has no material effect on the shareholders, the Commission seems inclined to allow the use of the exception, at times even if the technical requirements of the exception are not met. If, on the other hand, the merger that causes a change in a corporation's domicile also materially changes the bundle of rights that shareholders enjoyed prior to the merger, the Commission seems to conclude that the merger is not for the

23. For a discussion of alterations of shareholders' contracts as sales, see *infra* notes 50-68 and accompanying text.

24. Section 12(g)(1) of the 1934 Act subjects companies with at least 500 shareholders and \$1,000,000 in assets to the 1934 Act disclosure requirements. See 15 U.S.C. § 78l(g)(1) (1982). Pursuant to its rule-making authority, the Commission changed the threshold amount of assets required to \$5 million. See 17 C.F.R. § 240.12g-1 (1987).

25. 17 C.F.R. § 230.145(a)(2) (1987).

26. *Id.* For the text of Rule 145(a)(2) and the change-in-domicile exception contained therein, see *supra* note 1.

In a typical change-in-domicile merger, an operating company incorporated, for example, in California, forms a wholly-owned subsidiary in another state, such as Delaware. The operating company is then merged into the subsidiary, and the shareholders of the operating company receive shares of the subsidiary. See, e.g., H.F. Ahmanson & Company, SEC No-Action Letter (available May 9, 1985) (LEXIS, Fedsec library, NoAct file).

27. See, e.g., Caterpillar Tractor Co., SEC No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); American Bldg. Maintenance Indus., SEC No-Action Letter (available Mar. 11, 1985) (LEXIS, Fedsec library, NoAct file).

"sole purpose" of changing the corporation's domicile, and the change-in-domicile exception is unavailable.

Any change-in-domicile merger undoubtedly affects the rights of shareholders, at least to some extent, by the change in the applicable state law. The law of the new domicile may, for example, differ from that of the old domicile with regard to the distribution of control between shareholders and directors, dissenters' rights, cumulative voting or indemnification rights for officers and directors.²⁸ In addition, a number of companies have used the change-in-domicile merger to add antitakeover amendments to the company's articles of incorporation. These have included, for example, supermajority provisions, anti-greenmail²⁹ provisions and provisions limiting the right to call special shareholders' meetings.³⁰

The Commission, under the change-in-domicile exception, generally has permitted these types of changes in shareholders' rights,³¹ even though the combined effects of the new law and the new antitakeover provisions arguably materially alter the rights of the shareholders. Permitting these changes seems to be based on the rather practical rationale that the changes could, in any event, be effected without registration by a two-step process. First, the corporation could change its domicile without making any changes in its articles of incorporation. This would be exempt under the change-in-domicile exception. Then, after the dust has settled, the corporation could amend its new articles of incorporation to add the new provisions, a step that would not involve a sale of a secur-

28. See, e.g., H.F. Ahmanson & Company, SEC No-Action Letter (available May 9, 1985) (LEXIS, Fedsec library, NoAct file).

29. The most common definition of greenmail is a corporation's repurchase of its shares from a hostile bidder or shareholder as a way to end a threat to management's control of the corporation. Normally the repurchase involves a significant block of stock, at a premium over the market price which is not available to the other shareholders. See, e.g., *Pin v. Texaco*, 793 F.2d 1448, 1448-49 (5th Cir. 1986) (greenmail entails buying a large block of shares in the open market then threatening management with a tender offer for control of the company, with management responding by buying-out the greenmailer at a premium); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 n.13 (Del. 1985) ("'greenmail' refers to the practice of buying out a takeover bidder's stock at a premium that is not available to other shareholders in order to prevent the takeover"); Note, *Greenmail: Targeted Stock Repurchases and the Management-Entrenchment Hypothesis*, 98 Harv. L. Rev. 1045, 1045 & nn.2 & 3 (1985) ("when an investor purchases more than 5% of the stock of a target company . . . the target's directors may then offer to repurchase the investor's shares at a premium above the market price").

30. See, e.g., H.F. Ahmanson & Company, SEC No-Action Letter (available May 9, 1985) (LEXIS, Fedsec library, NoAct file).

31. *Id.* (no enforcement action despite change in shareholders' rights including right to change number of directors); see also *Caterpillar Tractor Co.*, SEC No-Action Letter (available Feb. 19, 1986) (LEXIS, Fedsec library, NoAct file) (same); *American Bldg. Maintenance Indus.*, SEC No-Action Letter (available Mar. 11, 1985) (LEXIS, Fedsec library, NoAct file) (same); *RLI Corp.*, SEC No-Action Letter (available Apr. 3, 1984) (LEXIS, Fedsec library, NoAct file) (no enforcement action despite changes in shareholders' rights including appraisal rights).

ity.³² By permitting the two steps to be combined into a single transaction exempt under the change-in-domicile exception, the Commission has eliminated the need for expensive and needless corporate procedures.³³

The Commission has, in certain instances, allowed issuers to rely on the change-in-domicile exception even though the proposed transaction technically did not fit within its terms. For example, the staff has allowed companies to rely on the change-in-domicile exception when there was in fact no change in the issuer's state of incorporation or organization. In the *Massachusetts Financial Development Fund, Inc.* no-action letter,³⁴ the Commission allowed five Massachusetts corporations operating as investment companies to reorganize as a Massachusetts business trust pursuant to the change-in-domicile exception. The *W.T. Rose Enterprises, Inc.* no-action letter³⁵ involved a statutory merger into a wholly-owned subsidiary located in the same state as the parent. The staff raised no objection to this transaction, apparently because the merger would have qualified for the change-in-domicile exemption if the surviving subsidiary corporation had been in a different state.³⁶

The Commission has also stretched the change-in-domicile exception to accommodate foreign companies. Specifically, the staff has permitted corporations incorporated in Canadian jurisdictions to rely upon the change-in-domicile exception to change their incorporation to other Canadian jurisdictions,³⁷ even though Rule 145(a)(2) describes the excepted change-in-domicile transaction as one that is "solely within the United States."³⁸

The use of the exemption by foreign companies, however, seems to be limited to changes between Canadian jurisdictions. In the *MSR Explora-*

32. One should not conclude, however, that all amendments to a corporation's articles of incorporation fall outside the definition of a sale. See *infra* text accompanying notes 50-68.

33. Eppler, *Rule 145 in Practice*, Fifth Annual Institute on Securities Regulation, at 332 (1973) (comments by Levenson).

34. Massachusetts Fin. Dev. Fund, SEC No-Action Letter (available Jan. 10, 1985) (LEXIS, Fedsec library, NoAct file). Similar results can be found in the following letters. See Meschaert Capital Accumulation Fund, SEC No-Action Letter (available Nov. 21, 1984) (LEXIS, Fedsec library, NoAct file); Scudder Common Stock Fund, SEC No-Action Letter (available Oct. 10, 1984) (LEXIS, Fedsec library, NoAct file); Colonial Option Income Fund, SEC No-Action Letter (available Mar. 31, 1983) (LEXIS, Fedsec library, NoAct file).

35. W.T. Rose Enter., SEC No-Action Letter (available Oct. 30, 1981) (LEXIS, Fedsec library, NoAct file).

36. *Id.* In its inquiry letter, W.T. Rose stressed that after the merger the shareholders would own the same assets in the same proportions. See *id.* (Inquiry-1). For a similar result involving corporations from a single state, see Vermont Research Corp., SEC No-Action Letter (available Oct. 30, 1980) (LEXIS, Fedsec library, NoAct file).

37. United Siscoe Mines Ltd., SEC No-Action Letter (available Mar. 14, 1980) (LEXIS, Fedsec library, NoAct file); Canadian Merrill, Ltd., SEC No-Action Letter (available Jan. 16, 1978) (LEXIS, Fedsec library, NoAct file).

38. For the text of Rule 145(a)(2), see *supra* note 1.

tion, Ltd. no-action letter³⁹ for example, the staff denied a no-action request to a proposed change-in-domicile from Alberta, Canada to Wyoming, concluding that the change-in-domicile exception should not be available because the transaction involved a "significant corporate reorganization resulting from a change in domicile from one country to another"⁴⁰ It should not be surprising, then, that the staff denied the availability of the change-in-domicile exception to a Delaware corporation that proposed to reincorporate in the Cayman Islands.⁴¹ In that letter, the staff stated that it "draws a sharp distinction between changes of domicile effected entirely within the United States or North America and those involving change from within the United States to a totally foreign domicile."⁴²

Considered together, the no-action letters described in this section suggest that the availability of the change-in-domicile exception depends upon the significance of the changes in shareholders' rights. Thus the Commission is unwilling to extend the change-in-domicile exception to transactions that materially change the rights of the shareholders involved, such as when the transactions would result in the applicability of laws of a foreign country. On the other hand, the Commission seems willing to stretch the exception to include other transactions not technically within the rule, such as transactions that are purely intrastate or among jurisdictions in Canada, presumably because the similarity in the applicable laws results in no material change in shareholders' rights.

4. Changes in Issuer's Form of Entity

The Commission has faced similar issues when companies have tried to rely on the change-in-domicile exception to alter the form of entity of the business. The Commission, however, has not dealt with these situations consistently.

The most typical situation has involved a change by an investment company from a corporate form to a Massachusetts business trust.⁴³ In such situations, the staff consistently has issued no-action letters, apparently concluding that such changes fit within the letter or at least spirit of the change-in-domicile exception.⁴⁴ The Commission, however, has indi-

39. MSR Exploration, Ltd., SEC No-Action Letter (available Dec. 30, 1982) (LEXIS, Fedsec library, NoAct file).

40. *Id.*

41. Apco Argentina, Inc., SEC No-Action Letter (available Feb. 12, 1979) (LEXIS, Fedsec library, NoAct file).

42. *Id.*

43. See, e.g., G.T. Pacific Fund, SEC No-Action Letter (available Mar. 25, 1985) (LEXIS, Fedsec library, NoAct file) (staff refused to respond to the inquiry); Lowry Market Timing Fund, SEC No-Action Letter (available Feb. 8, 1985) (LEXIS, Fedsec library, NoAct file) (change by a Texas corporation operating as an investment company to a Massachusetts business trust); Frank Russell Investment Co., SEC No-Action Letter (available Dec. 3, 1984) (LEXIS, Fedsec library, NoAct file) (an investment company changed from a Maryland corporation to a Massachusetts business trust).

44. See, e.g., Lowry Market Timing Fund, SEC No-Action Letter (available Feb. 8,

cated on at least two occasions that a change *from* a business trust *to* a corporation involves a sale and thus is not exempt from the registration requirements.⁴⁵

Similarly, under the change-in-domicile exception, the staff has allowed investment companies operating as limited partnerships to change to a Massachusetts business trust⁴⁶ or to change to corporate form.⁴⁷ It, however, refused a no-action request for the reorganization of a cooperative as a corporation⁴⁸ and a mutual insurance company as a corporation.⁴⁹

These responses obviously are difficult or, perhaps, impossible to reconcile. The Commission has not indicated why it treats a limited partnership differently than a cooperative or a mutual insurance company. Nor has it indicated why a change *to* a Massachusetts business trust differs from a change *from* such a trust. The analysis here, however, should be the same as that described above. Specifically, if the change in the company's form of entity results in material alterations in the rights of the entity's owners, the transaction should be classified as a sale, since shareholders voting on such transactions need the disclosure required by the 1933 Act. In judging materiality, the Commission (or other decisionmaker) should weigh carefully matters such as changes in distribution of control, rights to share in the profits of the enterprise, limited liability and tax treatment. These are significant elements of ownership that may change when the form of the business entity is altered, and one

1985) (LEXIS, Fedsec library, NoAct file); Frank Russell Investment Co., SEC No-Action Letter (available Dec. 3, 1984) (LEXIS, Fedsec library, NoAct file).

Recently, the staff indicated an unwillingness to continue to issue no-action letters for reorganizations of corporate investment companies into Massachusetts business trusts, but this indication clearly was only a matter of administrative economy and reflected no change in policy. In G.T. Pacific Fund, SEC No-Action Letter (available Mar. 25, 1985) (LEXIS, Fedsec library, NoAct file), the staff stated:

The staff, on a number of occasions, has stated its views with respect to the conditions under which an investment company may reorganize to change its domicile or legal form, or both. . . . Having stated our views, we will no longer respond to letters in this area unless they present novel or unusual issues.

Id. (citations omitted).

45. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part II, Illustration C, Question C-1, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at p. 3067-6 (Feb. 28, 1974). Similarly, in Mission Investment Trust, SEC No-Action Letter (available July 2, 1981) (LEXIS, Fedsec library, NoAct file), an investment company wanted to change from a California business trust to a California corporation. The Commission refused to grant no-action, stating that the change-in-domicile exception "cannot be expanded to include changes in organizational form." *Id.*

46. See Fidelity Exchange Fund, SEC No-Action Letter (available July 23, 1984) (LEXIS, Fedsec library, NoAct file).

47. See Kemper Municipal Bond Fund, SEC No-Action Letter (available Dec. 22, 1976) (LEXIS, Fedsec library, NoAct file).

48. See Rochester Drug Coop., SEC No-Action Letter (available Oct. 5, 1973) (LEXIS, Fedsec library, NoAct file).

49. See Home Farmers Mutual Ins. Ass'n, SEC No-Action Letter (available Oct. 5, 1981) (LEXIS, Fedsec library, NoAct file).

should assume that a material change in any of these elements raises the risk of the transaction's being deemed a sale. Unfortunately, the Commission has offered little help regarding the absolute or relative importance of such elements.

5. Changes in Shareholders' Rights

Transactions that alter the rights of shareholders, of course, are not limited to situations involving a change-in-domicile merger. For example, shareholders can amend a corporation's articles of incorporation to authorize additional shares of stock, add antitakeover provisions, increase the number of directors or change the dividend, redemption, conversion, voting, liquidation or other rights of shareholders.

The Commission enacted Rule 145(a)(1)⁵⁰ as a guide for determining whether at least some of the foregoing transactions constitute sales under the federal securities laws. The Rule includes in the definition of a sale a "reclassification of securities of such corporation . . . , which involves the substitution of a security for another security"⁵¹ Although neither the term "reclassification" nor the term "substitution" is defined, the provision seems to be designed to include in the definition of sale only reclassifications that involve material alterations in the rights of shareholders. If, therefore, an amendment to a company's articles of incorporation results only in an immaterial change in shareholders' rights, the transaction should not be considered a "substitution of a security" within the meaning of Rule 145(a)(1).

This is the same analysis suggested above as appropriate for determining the availability of the change-in-domicile exception.⁵² Accordingly, the Commission's no-action responses interpreting the change-in-domicile exception should be applicable to a recapitalization accomplished by an amendment to a company's articles of incorporation. Thus, for example, amending a company's articles of incorporation to add antitakeover provisions⁵³ or to change cumulative voting rights⁵⁴ should not be considered by the Commission to involve a sale of a security, since those changes would not involve a sale if accomplished in a change-in-domicile merger.

When, however, the individual contractual rights of shareholders are changed by a corporate vote, the Commission is likely to conclude that a sale is involved. The Commission indicated, for example, that a sale would occur when shareholders vote to extend voting rights to a previ-

50. 17 C.F.R. § 230.145(a)(1) (1987).

51. *Id.* For the text of rule 145(a)(1), see *supra* note 1.

52. See *supra* text accompanying notes 25-42.

53. See H.F. Ahmanson & Company, SEC No-Action Letter (available May 9, 1985) (LEXIS, Fedsec library, NoAct file).

54. See *id.* (unlike the law of the current domicile, cumulative voting would not be mandatory in the new domicile).

ously non-voting class of securities.⁵⁵ This change in the allocation of control of the corporation seems to be the type of fundamental change in the shareholders' investment contract that the Commission views as necessitating the protection of the securities laws.⁵⁶ Similarly, material amendments to a company's articles of incorporation affecting other fundamental contractual rights of shareholders, such as dividend rights, liquidation rights, redemption rights, conversion features or elimination of arrearages, also should be deemed to involve the sale of a new security.

The Commission should apply the same analysis and reach the same result if the reclassification is effected by a merger rather than by an amendment to the company's articles. Assume, for example, that Alpha Co. is merged into Beta Co., a corporation with no assets, and that the Alpha shareholders receive new Beta shares in the transaction. If the new Beta shares vary only immaterially from the Alpha shares, no sale should be involved with regard to the Alpha shareholders, even though the transaction seems to fit into the definition of a sale under the merger provision of Rule 145(a)(2).⁵⁷ When shareholders vote on such immaterial changes in their bundle of rights, no sale of securities results regardless of the deal's structure, and thus there is no need to subject the transaction to the disclosure requirements of the 1933 Act.

Courts also have decided a number of cases involving the question of whether changes in shareholders' rights constitute sales of securities.⁵⁸ Generally, the judiciary has concluded that a sale occurs if, as one judge stated, there is "a substantial modification of an investment contract creating fresh rights and obligations."⁵⁹ An illustrative decision is *Ahern v. Gaussoin*,⁶⁰ a case in which noteholders exchanged notes of a not-for-profit corporation for notes in the corporation after it reorganized as a

55. See First Pyramid Ins. Co. of Am., SEC No-Action Letter (available Dec. 3, 1976) (LEXIS, Fedsec library, NoAct file); see also Trans World Corp.: Trans World Airlines, SEC No-Action Letter (available Dec. 9, 1983) (LEXIS, Fedsec library, NoAct file) (staff stating that it "does not necessarily agree" with the company's assertion that Rule 145 does not apply to such an amendment, but declining to take enforcement action because another exemption from registration was available regardless of the applicability of Rule 145).

56. But see Providence and Worcester Company, SEC No-Action Letter (available Aug. 20, 1982) (LEXIS, Fedsec library, NoAct file) (Commission found no sale to be involved where shareholders voted to change disproportionate voting rights to proportionate voting rights).

57. Cf. W.T. Rose Enter., SEC No-Action Letter (available Oct. 30, 1981) (LEXIS, Fedsec library, NoAct file) (Commission found no sale involved when company merged with a wholly-owned subsidiary).

58. See, e.g., *United States v. New York, N.H. & H. R.R.*, 276 F.2d 525 (2d Cir. 1960), cert. denied, 362 U.S. 961 (1960); *SEC v. Associated Gas & Elec. Co.*, 99 F.2d 795 (2d Cir. 1938) (involving a similar question under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6 (1977)); *Western Air Lines v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (change in voting rights of shareholders attempted by corporation deemed a sale under Cal. Corp. Code § 25009 (currently at Cal. Corp. Code § 25017 (West Supp. 1988))).

59. *Igenito v. Bermec Corp.*, 376 F. Supp. 1154, 1182 (S.D.N.Y. 1974).

60. 611 F. Supp. 1465 (D. Ore. 1985).

profit entity. In the reorganization, the noteholders' rights were changed to provide for an interest rate to be determined from time to time, a principal payable upon demand and collateral to secure the obligations. The trial judge characterized this as a "close question" but concluded that a sale was involved.⁶¹

Although the courts in *In re Penn Central Securities Litigation*⁶² and *Ahern v. Gaussoin* reached different results, they applied the same principle. In *Penn Central*, the district court found no sale even though the plaintiffs claimed that the recapitalization changed their preemptive rights, cumulative voting rights and the par value of their stock. The court characterized the transaction as "internal corporate action" that did not rise to the level of a sale.⁶³ On appeal to the Third Circuit, the plaintiffs changed the thrust of their claims, arguing that the reorganization altered their appraisal rights, interfered with their ability to intervene in the company's bankruptcy proceedings and allowed the company to engage in new types of diversification.⁶⁴ Still, the Third Circuit concluded that no sale was involved.⁶⁵

There are other cases, however, with results that seem more questionable, although they are not necessarily theoretically inconsistent with the analysis offered here. In two of these cases, *Watts v. Des Moines Register and Tribune*⁶⁶ and *McCloskey v. McCloskey*,⁶⁷ separate courts reached the conclusion that an exchange by shareholders of stock for shares in a voting trust that was to run for a period of ten years did not constitute a sale of a security.⁶⁸ Both decisions relied heavily on the fact that only the voting rights of the shareholders were affected temporarily by the exchange and all other shareholders' rights remained intact.⁶⁹

In a third case, *Broad v. Rockwell International Corporation*,⁷⁰ the Court of Appeals for the Fifth Circuit held that no sale was involved where debentureholders' right to convert to common stock was altered to allow the debentureholders the right to convert to cash. The court stated that it did "not feel that the [alteration in the conversion right to create a cash-out option], so . . . 'substantially changed' the underlying security that it produce[d] a . . . sale"⁷¹ The principle applied in *Watts*, *McCloskey* and *Broad* seems to be the same as the principle applied in the other cases cited herein.⁷² As a result, and in order to support their con-

61. See *id.* at 1478-79.

62. 347 F. Supp. 1327 (E.D. Pa. 1972), *aff'd*, 494 F.2d 528 (3d Cir. 1974).

63. *Id.* at 1337-38.

64. See 494 F.2d 528, 535-39 (3d Cir. 1974).

65. See *id.* at 539.

66. 525 F. Supp. 1311 (S.D. Iowa 1981).

67. 450 F. Supp. 991 (E.D. Pa. 1978).

68. See *Watts*, 525 F. Supp. at 1320; *McCloskey*, 450 F. Supp. at 995.

69. See *Watts*, 525 F. Supp. at 1320; *McCloskey*, 450 F. Supp. at 995.

70. 614 F.2d 418 (5th Cir. 1980), *cert. denied*, 454 U.S. 965 (1981).

71. See *id.* at 438.

72. See *supra* text accompanying notes 60-65 and cases cited and discussed therein.

clusions that the changes involved no sales of securities, the courts in *Watts*, *McClosky*, and *Broad* undertook to demonstrate the insignificance of the changes in the investors' rights.⁷³ This Author, however, is unconvinced by the courts' analysis. Such changes in voting and conversion rights are material to shareholders, who need disclosure in order to decide whether to approve the alteration in their rights.

Notwithstanding some uncertainty in application,⁷⁴ both the courts and the Commission seem willing to find a sale when the rights of shareholders are altered materially.⁷⁵ Consequently, a sale is more likely to be found in instances in which important contractual rights of the shareholders are directly affected, such as material alterations in the rights to dividends, liquidation, redemption, conversion, arrearages or voting. On the other hand, consistent with the proffered analysis, both courts and the Commission seem less likely to find sales where alterations affect corporate governance or other matters that have a more general impact on the corporation as a whole, such as when shareholders vote to expand the corporate business into new areas, to eliminate or to adopt cumulative voting provisions or antitakeover measures including supermajority provisions, provisions for classified boards, and limitations on the rights to call meetings and remove directors.

6. Changes in Organizational Structure

Since the promulgation of Rule 145, the Commission has included in the definition of "sale" transactions that result in what the Commission considers to be "significant changes in the issuer's basic organizational structure."⁷⁶ The most prevalent type of such transaction faced by the Commission has been the change in the ownership configuration of a corporation from a single company to a holding company.⁷⁷

In a typical situation, the operating company causes the formation of a

73. See *supra* text accompanying notes 66-71.

74. Professor Loss has stated:

[A] change in interest or dividend rate or liquidation preference or underlying security, or a change in the identity of the issuer, would seem quite clearly to result in a new security. On the other hand, there is likely to be agreement that a mere change in the name of the security (perhaps from common to Class B stock), or a change in the name of the issuer without a change of identity, or certain types of charter amendment affecting the powers of the directors, do not make a new security. In between come a great variety of other changes—for example, from par to no par or vice versa, changes in par or stated value, changes in redemption or cumulative or conversion features, various changes in voting rights. There the answer must depend on the context

L. Loss, *Fundamentals of Securities Regulation* 264 (1983).

75. For a discussion of alterations of shareholders' rights, see Campbell, *Voluntary Recapitalizations, Fairness, and Rule 10b-5: Life Along the Trail of Santa Fe*, 66 Ky. L.J. 267, 267-71 (1977).

76. Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part II, Illustration D, 1 Fed. Sec. L. Rep. (CCH) 3058, at 3067-6 (Feb. 28, 1974).

77. These transactions have been most prevalent in the banking industry, where

holding company with a subsidiary. Initially, the holding company and the subsidiary are capitalized only nominally and, in fact, are mere vehicles for the facilitation of the change to a holding company configuration. A merger subsequently is effected between the old operating company and the newly formed subsidiary, as a part of which the shareholders of the operating company exchange their stock for stock in the new holding company. As a result of this transaction, the shareholders of the old operating company become shareholders of the holding company, which in turn owns 100% of the new operating subsidiary.

Although it is possible to use this transaction to alter the fundamental rights of the shareholders of the old operating company, often there are no such changes, and the sole purpose of the transaction is to interpose a holding company between the owners and the operating company. Even in these situations, however, the Commission consistently has taken the position that the transaction involves a significant change in the organizational structure and thus involves a sale of a security to the old shareholders of the operating company.⁷⁸ The Commission takes this position whether the transaction is structured as a forward triangular merger,⁷⁹ a reverse triangular merger,⁸⁰ a merger into a subsidiary⁸¹ or a transfer of substantially all the assets of a corporation.⁸² Similarly, the presence or absence of any debt assumption has been irrelevant to the Commission's view that the transaction involves a sale.⁸³

banks are able to facilitate their expansion into non-banking areas by operating as bank holding companies.

78. See, e.g., Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file); F. Jos. Lamb Co., SEC No-Action Letter (available Dec. 24, 1980) (LEXIS, Fedsec library, NoAct file); cf. Hospital Corp. of Am., SEC No-Action Letter (available March 19, 1987) (LEXIS, Fedsec library, NoAct file) (Commission allowed some structural changes, although fundamentally the corporation was already in a holding company configuration before as well as after the changes).

79. See Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file). In a forward triangular merger, the acquired company is merged into a subsidiary of the acquiring company, and the shareholders of the acquired company exchange their acquired company stock typically for cash or securities of the acquiring company.

80. See The Limited Stores, SEC No-Action Letter (available May 12, 1982) (LEXIS, Fedsec library, NoAct file). In a reverse triangular merger, a subsidiary of the acquiring company is merged into the acquired company, and the shareholders of the acquired company exchange their acquired company stock typically for cash or securities of the acquiring company.

81. See Producers Chem. Corp., SEC No-Action Letter (available Aug. 6, 1975) (LEXIS, Fedsec library, NoAct file).

82. In the no-action letter of Bob Evans Farms, Inc., SEC No-Action Letter (available Dec. 4, 1985) (LEXIS, Fedsec library, NoAct file), the company, following a merger to reincorporate in a new state, proposed to transfer substantially all of the company's assets to a wholly-owned subsidiary. This transaction essentially put the company in a holding company configuration, although the change was effected by a transfer of assets rather than the more typical merger. The Commission refused to allow this without registration. *Id.*

83. Holding company transactions are often used in acquisition situations, with the acquisition being financed, at least in part, by loans made to the holding company by a

Although less common, the Commission also has faced the question of whether the change from a holding company to a single company configuration is a sale for Rule 145 purposes. While one fairly recent no-action letter may cloud this area a bit,⁸⁴ the staff has, as one might expect, generally concluded that such a change involves a sale of securities to those shareholders who exchange shares of the holding company for shares of the operating company.⁸⁵

The Commission's position that a change to or from a holding company configuration necessarily involves a sale of a security is unsound. The transaction should be considered a sale only if the structural change materially affects shareholders' rights, since otherwise the voting shareholders are making no material investment judgment and thus do not need the protection of the securities laws.

If, therefore, an issuer uses a merger transaction to interpose a holding company between the operating company and its shareholders, exchanging share for share with no change in shareholders' rights, management, capitalization or assets, then voting on that exchange involves the shareholders in no material investment decision and thus the transaction should not be deemed a sale. On the other hand, if the transaction, in addition to changing the issuer into a holding company configuration, changes shareholders' voting or dividend rights or adds significant new assets to the corporation, then the transaction should be considered a sale, since shareholders, when voting on such a transaction, need disclosure. The point is, however, that the change in structure, as an isolated factor, generally is too immaterial to justify characterization of the transaction as a sale.

The small amount of case law in the area is consistent with the Author's analysis. In *In re Penn Central Securities Litigation*,⁸⁶ Penn Cen-

third party lender, resulting in increased debt for the corporation. The Commission, however, has found a sale even without the assumption of acquisition debt by the holding company. See, e.g., Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file); The Limited Stores, SEC No-Action Letter (available May 12, 1982) (LEXIS, Fedsec library, NoAct file); F. Jos. Lamb Co., SEC No-Action Letter (available Dec. 24, 1980) (LEXIS, Fedsec library, NoAct file). In Founders Bank & Trust Co., SEC No-Action Letter (available Feb. 16, 1981) (LEXIS, Fedsec library, NoAct file), the staff concluded that a sale was involved in a triangular merger where the holding company assumed the acquisition debt.

84. In Clevepak Corp., SEC No-Action Letter (available Apr. 15, 1985) (LEXIS, Fedsec library, NoAct file), the staff assumed a no-action position with regard to a merger of a parent into an operating subsidiary. In its correspondence with the SEC, Clevepak focused on the fact that the parent had previously guaranteed the debt of the subsidiary. The merger, therefore, did not expose the shareholders to new risks. See *id.* (Inquiry-1).

85. See, e.g., BTK Indus., SEC No-Action Letter (available March 24, 1983) (LEXIS, Fedsec library, NoAct file); Reinsurance Dev. Corp., SEC No-Action Letter (available Sept. 13, 1974) (LEXIS, Fedsec library, NoAct file); First Nat'l Corp. (First Nat'l Life Ins. Co.), SEC No-Action Letter (available Apr. 22, 1974) (LEXIS, Fedsec library, NoAct file).

86. 347 F. Supp. 1327 (E.D. Pa. 1972), *aff'd*, 494 F.2d 528 (3d Cir. 1974).

tral effected a reverse triangular merger, interposing a holding company between shareholders and the operating company. The purpose of the transaction apparently was to facilitate the diversification of Penn Central into non-railroad business.⁸⁷ When shareholders brought suit under Rule 10b-5 of the 1934 Act,⁸⁸ alleging misstatements and nondisclosures in connection with the transaction, the lower and appellate courts both agreed that there was no sale of a security and thus no Rule 10b-5 claim.⁸⁹ Both courts seemed to base their decisions on the immateriality of the changes involved. Structural changes alone, therefore, were insufficient to create a sale.

7. Spin-Offs

A spin-off involves the separation of a part of a corporation's assets into a new entity, the shares of which then are distributed pro rata to existing shareholders. An example of this is seen in the *W.R. Grace & Co.* no-action letter,⁹⁰ where Diamond, a company with both coal and non-coal assets, chose to separate its non-coal assets into a wholly owned subsidiary of Diamond and then to distribute the shares of the subsidiary pro rata to the Diamond shareholders. The transaction was subject to approval by the Diamond shareholders, who paid no consideration for the distributed stock.⁹¹

In the *W.R. Grace* no-action letter⁹² and elsewhere,⁹³ the Commission concluded that a spin-off of the type described in the preceding paragraph involves a sale of the distributed securities to the shareholders who vote on and receive the new securities. This is consistent with and apparently based upon the Commission's general position that structural changes in a corporation involve material changes in the rights of the shareholders and thus merit the protection of the 1933 Act.⁹⁴

The Commission has made some practical concessions regarding spin-offs and now requires no registration of a spin-off if (1) the spin-off is accompanied by a proxy statement meeting the requirements of the proxy rules under the 1934 Act and (2) the company whose shares are distributed is or becomes registered under the 1934 Act.⁹⁵

87. See *id.* at 1337.

88. 17 C.F.R. § 240.10b-5 (1987).

89. See 494 F.2d at 538-39; 347 F. Supp. at 1337-39.

90. SEC No-Action Letter (available June 7, 1974) (LEXIS, Fedsec library, NoAct file).

91. See *id.*

92. *Id.*

93. See, e.g., Mustang Fuel Corp. and Mustang Energy Corp., SEC No-Action Letter (available Aug. 25, 1986) (LEXIS, Fedsec library, NoAct file).

94. See *supra* notes 76-85 and accompanying text.

95. See, e.g., Hazelton Laboratories Corp., SEC No-Action Letter (available Sept. 13, 1985) (LEXIS, Fedsec library, NoAct file); Tele-Communications, Inc., SEC No-Action Letter (available Jan. 21, 1985) (LEXIS, Fedsec library, NoAct file); Tucson Elec. Power Co., SEC No-Action Letter (available Nov. 30, 1984) (LEXIS, Fedsec library, NoAct file); Enstar Corp., SEC No-Action Letter (available Sept. 17, 1984) (LEXIS, Fedsec li-

On a theoretical level, this concession by the Commission makes no sense, since the distribution of a proxy statement, and a company's status under the 1934 Act are completely unrelated to the definition of a sale. On a practical level, however, the accommodation is more defensible. If the distributing company is a reporting company under the 1934 Act and solicits proxies or delivers an information statement to the shareholders prior to their vote, there is, arguably, no need to add the 1933 Act disclosure requirements to that regulatory scheme. The proxy statement provides the appropriate vehicle for disclosure.⁹⁶

More generally, however, the Commission's basic position that a spin-off involves the sale of a security is defensible. Although superficially a spin-off may appear to involve a mere reshuffling of the pieces of paper representing the ownership of the whole entity, such a transaction can involve material changes for shareholders. For example, it is likely that the segment that is spun off will have, either immediately or in the future, management different from the remaining corporation. The newly independent segment also will be cut off from the financial resources of the rest of the corporation. In addition, and perhaps most importantly, there may be differences in value between the sum of the independent parts and the whole—whether rational or not, the market might place a higher or lower value on the fragmented entity.⁹⁷

A different result is required, however, when a board approves a spin-off without a shareholder vote. While one might concede that a sale occurs when shareholders vote to authorize a spin-off, it is impossible, in this Author's view, to find a sale without a vote of shareholders. If the board of directors authorizes the spin-off without any shareholder approval, the shareholders are not involved in any material investment decision. As a result, shareholders do not need the protection of the disclosure provisions of the 1933 Act, and it is inappropriate to conclude

brary, NoAct file); *Trans World Corp.*: *Trans World Airlines*, SEC No-Action Letter (available Dec. 9, 1983) (LEXIS, Fedsec library, NoAct file). The Commission, however, reached a contrary decision in an earlier no-action response. See *Jenoa, Inc.*, SEC No-Action Letter (available Nov. 3, 1978) (LEXIS, Fedsec library, NoAct file).

96. In instances where the Commission's criteria are met and, as a result, no registration of a spin-off is required, the Commission also has taken the position that the securities in the hands of the shareholders are not restricted and thus are freely tradable. See, e.g., *Hazelton Laboratories Corp.*, SEC No-Action Letter (available Sept. 13, 1985) (LEXIS, Fedsec library, NoAct file); *Tele-Communications, Inc.*, SEC No-Action Letter (available Jan. 21, 1985) (LEXIS, Fedsec library, NoAct file); *Tucson Elec. Power Co.*, SEC No-Action Letter (available Nov. 30, 1984) (LEXIS, Fedsec library, NoAct file); *Enstar Corp.*, SEC No-Action Letter (available Sept. 17, 1984) (LEXIS, Fedsec library, NoAct file); *Trans World Corp.*: *Trans World Airlines*, SEC No-Action Letter (available Dec. 9, 1983) (LEXIS, Fedsec library, NoAct file).

97. An example of this phenomenon surfaced in the recent battle for control of Revlon. In that case, Revlon's investment bankers estimated that, given sufficient time, they could sell the divisions of Revlon for approximately \$60 to \$70 per share, but if forced to sell Revlon as a whole, the price would be "in the 'mid 50' dollar range." *Revlon v. MacAndrews & Forbes Holdings*, 506 A.2d 173, 177 (Del. 1986).

that the transaction involves a sale of securities to the nonvoting shareholders.

There are, however, cases⁹⁸ and no-action letters⁹⁹ that are inconsistent with the foregoing assertion. Generally, the cases involve a common scheme in which a publicly held parent corporation (parent) forms a subsidiary company (subsidiary), which acquires the assets of a privately held third company (third) in exchange for stock in the subsidiary.¹⁰⁰ The parent, which continues to retain shares in the subsidiary after the acquisition, spins off its shares of the subsidiary pro rata to its (parent's) public shareholders. The spin-off is authorized by the board of directors of the parent without any shareholder vote. The result of the transaction is that the subsidiary, whose assets usually consist only of the assets acquired from third, is now publicly held, but no 1933 Act registration statement was ever filed by the subsidiary.

The courts have held that such spin-offs involved the sale of the distributed securities to the shareholders of the parent who received the stock of the subsidiary, even though shareholders did not vote on the transaction.¹⁰¹ After struggling, the courts concluded that the transactions involved a "disposition of a security . . . for value"¹⁰² and thus a "sale" within the section 2(3) definition. One court found the value necessary to support a sale "in the form of a contribution of substantially new assets to [the] . . . subsidiary and the creation of a public market in the shares with its resulting benefits to the defendants, including insiders."¹⁰³

It appears that the Commission also is prepared to find a sale of securities in a spin-off that involves no shareholder vote. In the *Chester County Security Fund, Inc.* no-action letter,¹⁰⁴ for example, the parent acquired, perhaps from an affiliated company, the subsidiary at least two years

98. See *infra* note 100.

99. See, e.g., *Chester County Sec. Fund*, SEC No-Action Letter (available Dec. 15, 1986) (LEXIS, Fedsec library, NoAct file) (Commission analysis indicating that a sale would occur, without shareholder vote on spin-off); *Coaches of Am., Inc.*, SEC No-Action Letter (available July 29, 1974) (LEXIS, Fedsec library, NoAct file) (Commission indicating that 1933 Act registration was necessary for a spin-off to be effected by the board of directors without shareholder approval).

100. See *SEC v. Datronics Engineers, Inc.*, 490 F.2d 250, 253 (4th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *SEC v. Harwyn Indus.*, 326 F. Supp. 943, 945-46 (S.D.N.Y. 1971).

101. See *Datronics*, 490 F.2d at 254-55; *Harwyn Indus.*, 326 F. Supp. at 954.

102. See *Datronics*, 490 F.2d at 253-54 (quoting the definition of sale in § 2(3) of the 1933 Act, 15 U.S.C. § 77b(3) (1982)); *Harwyn Indus.*, 326 F. Supp. at 953-54 (same).

103. *Harwyn Indus.*, 326 F. Supp. at 954. Theoretically, these courts, in looking for "value" to support the finding of a sale, are concentrating on the wrong party. The focus should be on whether the putative purchaser (the shareholder) surrenders value, not on whether the parent is benefitted by the transaction in some fashion. The purpose of the 1933 Act is to require disclosure when investors part with value in exchange for securities.

104. SEC No-Action Letter (available Dec. 15, 1986) (LEXIS, Fedsec library, NoAct file).

prior to the spin-off. Apparently, the spin-off was proposed solely to extricate the parent from a line of business that it no longer desired to pursue. No shareholder vote was required for the spin-off. Nonetheless, the Commission seemed to conclude that a sale was involved.¹⁰⁵

These opinions indicate that the Commission and the courts become concerned when a privately held company, third, is converted into a publicly held company without registration under the 1933 Act.¹⁰⁶ Nevertheless, the cases are clearly wrong. Since the shareholders of the parent are involved in no material investment decision, disclosure to such shareholders is unnecessary, and therefore it is inappropriate to define the transaction as a sale under the 1933 Act. Instead, the problem, to the extent that there is one, is properly addressed under the provisions of the 1934 Act. Specifically, if after the spin-off is completed the subsidiary has five hundred shareholders and \$5 million or more in assets, it will be subject to the reporting requirements and the proxy rules of the 1934 Act.¹⁰⁷ This is the vehicle through which Congress and the Commission decided to ensure disclosure by publicly held companies, and it makes no sense to force such transactions, at the cost of substantial theoretical damage, into a 1933 Act transaction.

8. Transfer of Assets Without Subsequent Liquidation

A curious problem concerning Rule 145(a)(3)¹⁰⁸ arises when shareholders of the acquired company vote on whether the company should transfer its assets in exchange for stock in the acquiring company. Such a transaction involves a sale of securities to the shareholders of the acquired company only if the acquiring company's securities, which are exchanged directly with the acquired company, are distributed through a subsequent liquidation to the voting shareholders of the acquired company.¹⁰⁹ Thus, if the acquiring company's securities are retained by the acquired company, the transaction does not involve an offer or a sale of securities to the shareholders of the acquired company.

One must not, however, conclude that such a transaction involves no sale of securities. There is a sale, but the sale is, as a conceptual matter,

105. *See id.* Registration was not required, however, because the shareholders of the parent, who were to receive the shares of the spun-off subsidiary, received information equivalent to that required by Regulation 14C of the 1934 Act, *see id.* (citing Regulation 14C, 17 C.F.R. § 240.14c-1 to .14c-101 (1987)), and the spun-off company was to be registered under the 1934 Act prior to the distribution of the spun-off shares. *See id.*

106. One court refused to find a sale in a conventional spin-off involving a "closely-held family corporation" which produced no "public market as found in the *Datronics* line of cases." *Rathborne v. Rathborne*, 508 F. Supp. 515, 518 (E.D. La. 1980), *aff'd*, 683 F.2d 914 (1982).

107. *See* 15 U.S.C. § 78l(g)(1) (1982). By rule, the Commission raised the asset limit to \$5 million. *See* 17 C.F.R. § 240.12g-1 (1987).

108. *See* 17 C.F.R. § 230.145(a)(3) (1987). For the text of Rule 145(a)(3), *see supra* note 1.

109. *See* 17 C.F.R. § 230.145(a)(3) (1987). For the text of Rule 145(a)(3), *see supra* note 1.

made to the acquired company, which purchases the securities in exchange for its assets. Rule 145(a)(3) provides that in the absence of a distribution, no sale is made to the shareholders of the acquired company.

The practical implication of this provision is significant to the acquiring company. Because the acquiring company is selling its securities only to one investor, the acquired company, it may be relieved of the burden of registration, since such a transaction likely would qualify for the exemption from registration provided by section 4(2)¹¹⁰ or Regulation D.¹¹¹ Those exemptions may not be available if, instead, one were required to count each shareholder of the acquired company as an offeree or purchaser of the acquiring company's securities.¹¹²

As a policy matter, however, it is difficult to understand the basis for the Commission's position on this matter. If shareholders of the acquired company vote to authorize the sale of the company's assets in exchange for the stock of the acquiring company, they are making an investment judgment. It seems unimportant whether the acquiring company shares are liquidated to the shareholders of the acquired company or are held by the agents of such shareholders at the acquired company level. In either event, if shareholders of the acquired company vote on the exchange, they are the decisionmakers with regard to the purchase of the stock of the acquiring company and fundamentally are making similar decisions.¹¹³ Disparate treatment, therefore, is inappropriate.

9. Sales to Nonvoting Shareholders

Rule 145 transactions often affect investors who have no voting rights with regard to the particular transactions involved. For example, corporate statutes typically do not authorize creditors (such as debentureholders) to vote on a merger.¹¹⁴ Similarly, minority shareholders of the acquired company normally do not vote in a short-form merger.¹¹⁵ Questions have arisen whether sales are involved when these nonvoting investors exchange their securities in the context of Rule 145 transactions.¹¹⁶

110. 15 U.S.C. § 77d(2) (1982).

111. 17 C.F.R. § 230.501 to .506 (1987).

112. Under Rule 506(b)(2) of Regulation D, the maximum number of unaccredited purchasers is 35. *See* 17 C.F.R. § 230.506(b)(2) (1987).

113. It is true, of course, that the shareholders of the selling company may also be entitled to disclosure pursuant to the proxy rules of the 1934 Act, 17 C.F.R. § 240.14a-3 (1987), if they vote on the transaction. If, however, the selling corporation is not registered under the 1934 Act, the shareholders of the selling company may be entitled to no disclosure when they vote.

114. *See, e.g.*, Revised Model Business Corporation Act § 11.03 (1987).

115. *See, e.g.*, Revised Model Business Corporation Act § 11.04 (1987). In a short-form merger, a subsidiary may be merged into a parent with only the approval of the parent's board of directors, provided the parent owns a substantial majority of the subsidiary's voting stock.

116. *See infra* notes 119-20.

The language of the Rule itself is helpful here, since it states that a sale occurs "so far as the security holders of a corporation . . . are concerned"¹¹⁷ when the reclassification, merger, consolidation or sale of assets "is submitted for the vote or consent of such security holders."¹¹⁸ The negative implication of this language is that nonvoting security holders are not involved in a sale.

The *Hy-Gain Electronics Corporation* no-action letter¹¹⁹ is consistent with this interpretation. In that situation, Hy-Gain Electronics Corporation intended to acquire DARCO, Inc. in a merger, and in the context of the transaction Hy-Gain would assume the obligations of DARCO's convertible debentures. Under the terms of the indenture relating to DARCO's convertible debentures, a merger of DARCO did not require approval of the debentureholder, but the acquiring company was obligated to assume all of DARCO's obligations under the indenture, including the conversion feature. The staff concluded that it was not necessary to register the new Hy-Gain debentures.

A similar response was obtained from the Commission in the *Natomas Co.* no-action letter.¹²⁰ There, Natomas proposed to effect a reverse triangular merger¹²¹ for the purposes of putting itself into a holding company configuration.¹²² In the transaction, the shareholders of Natomas would exchange their shares for stock in the holding company. Under the applicable state laws, however, the Natomas shareholders had no voting rights or appraisal rights in the transaction. Although the Commission issued its letter "without necessarily agreeing with [the] analysis that there is no . . . 'sale' within the meaning of . . . the 1933 Act,"¹²³ the Commission permitted the transaction to proceed without registration.¹²⁴

The Commission has, however, taken a different position on short-form mergers. In its 1974 release,¹²⁵ the Commission concluded that a short-form merger in which minority shareholders received stock in the parent would constitute a sale, even though the minority shareholders had no vote in the transaction. The Commission offered no analysis to support its conclusion.¹²⁶

117. 17 C.F.R. 230.145(a) (1987) (emphasis added).

118. *Id.*

119. SEC No-Action Letter (available Sept. 26, 1977) (LEXIS, Fedsec library, NoAct file).

120. SEC No-Action Letter (available Mar. 21, 1980) (LEXIS, Fedsec library, NoAct file).

121. See *supra* note 80.

122. See *supra* notes 77-83 and accompanying textual discussion of a holding company configuration.

123. Natomas Co., SEC No-Action Letter (available Mar. 21, 1980) (LEXIS, Fedsec library, NoAct file).

124. See *id.*

125. Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part V, Illustration C, Question C-1, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-9 (Feb. 28, 1974).

126. See *id.*

Fundamentally, the Commission's responses in this area are sound, although somewhat unexplained. The Commission's unarticulated premise appears to be that a sale occurs if a security holder exercises control over whether he acquires a new investment. This is why a sale is involved when a shareholder votes on a proposed merger from which he is to receive stock.¹²⁷ Similarly, although perhaps less obvious, a sale occurs when a nonvoting shareholder with appraisal rights is confronted with a merger in which he will receive stock in the acquiring corporation. For example, when a nonvoting shareholder of a company acquired in a short-form merger decides whether to accept the stock in the acquiring corporation or to exercise his appraisal rights, a sale occurs. The transaction involves the type of investment decision by the nonvoting shareholder that in the Commission's view justifies the imposition of disclosure requirements.

Extending this line of logic, one should conclude that no sale would occur with respect to a shareholder in a cash-out merger,¹²⁸ even if that shareholder is voting and has appraisal rights, since that shareholder is not making an investment decision concerning the purchase of a security. His only choice is to accept the proffered cash or pursue his appraisal rights.

Finally, the Commission is correct in its view that no sale is involved when one without either voting rights or appraisal rights exchanges securities in a stock-for-stock merger.¹²⁹ While such person obviously receives a new security in the transaction, he has no choice but to accept the proffered security. He is not involved in any material investment decision, and in such an instance disclosure is meaningless.

C. Sales Outside Rule 145

Most sales of securities, of course, fall outside Rule 145 and therefore are not subject to the special provisions and definitions of the Rule. Some of these transactions, however, may involve amalgamations or recapitalizations and thus look very much like a Rule 145 transaction. An example of this would be a B-type¹³⁰ reorganization in which shareholders of the acquired company are individually, and not in the context of a statutory merger, offered stock of the acquiring company in exchange for their acquired company stock.¹³¹ Another example, which was discussed

127. See *supra* notes 16-18 and accompanying text.

128. In a cash-out merger, shareholders of the acquired company receive cash, as opposed to stock in the acquiring company.

129. See *supra* text accompanying notes 118-24.

130. "B-type reorganization" refers to a tax exempt reorganization under § 368(a)(1)(B) of the Internal Revenue Code, 26 U.S.C. § 368(a)(1)(B) (1982). A discussion of the tax consequences of B-type reorganizations is beyond the scope of this Article. For an explanation see 2 B. Bittker, M. Emory & W. Streng, *Federal Income Taxation of Corporations and Shareholders*, Forms ¶ 14.13, at 14-228 to -230 (rev. ed. 1982).

131. It is clear that these exchanges are not within Rule 145. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release

earlier,¹³² is a sale of assets by the acquired company in exchange for the stock of the acquiring company, unaccompanied by a subsequent distribution of the acquiring company stock to the shareholders of the acquired company.¹³³

Although it is clear that such transactions technically are not within Rule 145¹³⁴ and thus are not subject to its special provisions, the Commission has nonetheless indicated a willingness to use Rule 145 for a certain amount of guidance regarding such transactions. For example, the Commission has indicated a willingness to allow the use of Form S-14¹³⁵ (and, one must assume, its successor, Form S-4¹³⁶) in certain such non-Rule 145 transactions.¹³⁷ It appears that the rationale for this administrative determination is based on the suitability of the Form as a disclosure guide for certain non-Rule 145 transactions, such as B-type reorganizations or sales of assets without liquidation.

A similar line of logic would indicate that Rule 145(b), which allows limited announcements of Rule 145 transactions,¹³⁸ should be considered an appropriate guide for announcements of non-Rule 145 amalgamations and recapitalizations.¹³⁹ Rule 145(b) is designed specifically to provide reasonable guidelines for announcements of Rule 145 transactions, and it seems sensible to use it as a guide for announcements of similar non-Rule 145 transactions, which also are material events to the companies and shareholders involved and thus require disclosure. The Commission, however, has not expressed its views regarding the availability of Rule 145(b) as a guide for announcements of non-Rule 145 transactions.

No. 5463 Part II, Illustration E, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-6 (Feb. 28, 1974). In *St. Lawrence Seaway Corp.*, SEC No-Action Letter (available Oct. 12, 1973) (LEXIS, Fedsec library, NoAct file), the Commission found Rule 145 to be unavailable for a voluntary exchange with the sole shareholder of a corporation.

The language of Rule 145 restricts its applicability to instances where the transaction "is submitted for the vote or consent of such security holders . . ." 17 C.F.R. § 230.145(a) (1987). For the text of Rule 145(a), see *supra* note 1. This requirement is not met in a B-type reorganization.

132. See *supra* notes 107-13 and accompanying text.

133. Rule 145(a)(3)(ii) requires some distribution to the shareholders of the corporation transferring its assets. See 17 C.F.R. § 230.145(a)(3)(ii) (1987). For the text of Rule 145(a)(3), see *supra* note 1. Two Commission no-action letters applying these concepts to exchanges of assets by limited partnerships are *Portage County Partners*, SEC No-Action Letter (available Dec. 2, 1985) (LEXIS, Fedsec library, NoAct file), and *South Ranch Oil Income & Trading Co.*, SEC No-Action Letter (available Aug. 20, 1982) (LEXIS, Fedsec library, NoAct file).

134. See *supra* notes 131 & 133.

135. 17 C.F.R. § 239.23 (1985).

136. Form S-14 was superceded by Form S-4 in 1985. See Securities Act Release No. 33-6578, 6 Fed. Sec. L. Rep. (CCH) ¶ 72,418, at 62,066 (Apr. 23, 1985); see also *infra* note 142.

137. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part V, Illustration C, Question C-2, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-9 (Feb. 28, 1974).

138. See 17 C.F.R. § 230.145(b) (1987). For the text of Rule 145(b) see *supra* note 1.

139. For a discussion of such announcements, see *infra* notes 172-187 and accompanying text.

Nor has the Commission expressed itself regarding the applicability of the Rule 145(c) definition of underwriter¹⁴⁰ to any of the amalgamations or recapitalizations that fall outside Rule 145. Here, however, it would be unwise to expand the applicability of that definition, because, as will be discussed later,¹⁴¹ that definition is flawed by its breadth, catching persons who sometimes have little ownership and no managerial responsibilities in the surviving company. To expand the Rule 145(c) definition outside Rule 145 transactions would, therefore, be entirely unwarranted.

D. Sales Within Rule 145

Although Rule 145 subjects certain transactions to the disclosure requirements of the 1933 Act, these transactions still may qualify for favorable treatment under other rules or provisions.

1. Registration and Available Exemptions

Normally, if the 1933 Act mandates registration of a Rule 145 transaction, it would be on a Form S-4, a registration statement adopted by the Commission for amalgamations and single company recapitalizations.¹⁴² Form S-4 also may be used to satisfy the parties' proxy disclosure requirements under the 1934 Act.¹⁴³ Thus, for example, if Alpha acquires Beta through a merger in exchange for Alpha stock, Alpha's and Beta's disclosure requirements under the federal proxy rules, assuming the companies report under the 1934 Act, and Alpha's prospectus delivery requirements under the 1933 Act, assuming the offering is to be registered, are both met by supplying the shareholders of the companies with a joint proxy statement that contains the information required by Form S-4.

It is also possible for a Rule 145 transaction to qualify for an exemption from the 1933 Act registration requirements.¹⁴⁴ With regard to transactional exemptions of general applicability, Regulation D,¹⁴⁵ which provides for exemptions from registration for certain limited offerings, may be applicable in Rule 145 transactions. Rule 145 transactions also may be effected pursuant to the other transactional exemptions, includ-

140. 17 C.F.R. § 230.145(c) (1987). For text of Rule 145(c) see *supra* note 1.

141. See *infra* notes 254-55 and accompanying text.

142. Form S-4 was adopted by the Commission in 1985. See Business Combination Transactions—Adoption of Registration Form, Securities Act Release No. 3-6578, 6 Fed. Sec. L. Rep. (CCH) ¶ 72,418, at 62,065 (Apr. 23, 1985).

Form S-4 incorporates the fundamental integration philosophy of Forms S-1, S-2 and S-3 by allowing participants in a Rule 145 transaction to incorporate by reference certain information about the companies involved in the transaction to the extent that the information is otherwise generally available, while requiring complete disclosure about the particular transaction. Securities Act Release No. 6578, 6 Fed. Sec. L. Rep. (CCH) ¶ 72,418, at 62,066 (Apr. 23, 1985), provides an excellent discussion of the new form.

143. Form S-4 provides a basis for using a single document to satisfy both the 1933 Act and 1934 Act requirements. See Form S-4, Gen. Instruction E, 2 Fed. Sec. L. Rep. (CCH) ¶ 7162, at 6262.

144. See 17 C.F.R. § 230.145 (1987) (Preliminary Note).

145. 17 C.F.R. §§ 230.501 to .506 (1987).

ing section 4(2),¹⁴⁶ the private placement exemption, section 4(6),¹⁴⁷ the accredited investors exemption, Regulation A,¹⁴⁸ the small-offerings exemption, or the intrastate exemptions under either Rule 147¹⁴⁹ or section 3(a)(11).¹⁵⁰ In addition, section 3(a)(9),¹⁵¹ which provides an exemption for certain single company recapitalizations,¹⁵² and section 3(a)(10),¹⁵³ which provides an exemption from registration for exchanges of securities approved as fair by courts or certain governmental agencies,¹⁵⁴ may be available for Rule 145 transactions. Finally, no registration of a Rule

146. Securities Act of 1933 § 4(2), 15 U.S.C. § 77d(2) (1982). See *Baker Industries, Inc.*, SEC No-Action Letter (available Oct. 14, 1981) (LEXIS, Fedsec library, NoAct file).

147. Securities Act of 1933 § 4(6), 15 U.S.C. § 77d(6) (1982). Section 4(6) was passed subsequent to the adoption of Rule 145, but it is clear from the language of the Preliminary Note to Rule 145 that section 4(6) would be available for a Rule 145 transaction. See 17 C.F.R. § 230.145 (1987) (Preliminary Note) ("[t]ransactions for which statutory exemptions under the Act . . . are otherwise available are not affected by Rule 145").

148. 17 C.F.R. §§ 230.251 to .264 (1987). See Securities Act Release No. 5463, Part I, Illustration D, Question D-1, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-4 (Feb. 28, 1974).

149. 17 C.F.R. § 230.147 (1987), was relied upon in *Hungry Tiger, Inc.*, SEC No-Action Letter (available Aug. 27, 1982) (LEXIS, Fedsec library, NoAct file).

150. 15 U.S.C. § 77c(11) (1982). The lack of clarity in this statutory exemption makes it practically unavailable. See Campbell, *The Plight of Small Issuers Under the Securities Act of 1933: Practical Foreclosure from the Capital Market*, 1977 Duke L.J. 1139, 1165-67.

151. 15 U.S.C. § 77c(a)(9) (1982).

152. There are a number of no-action letters dealing with the availability of § 3(a)(9) in Rule 145 transactions. See, e.g., *Clevepak Corp.*, SEC No-Action Letter (available Mar. 23, 1984) (LEXIS, Fedsec library, NoAct file); *Vista Mortgage & Realty*, SEC No-Action Letter (available June 18, 1981) (LEXIS, Fedsec library, NoAct file); see also, Securities Act Release No. 5463, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-4 (Feb. 28, 1974) (Illustration C).

For an excellent article on § 3(a)(9), see Hicks, *Recapitalizations Under Section 3(a)(9) of the Securities Act of 1933*, 61 Va. L. Rev. 1057 (1975).

153. 15 U.S.C. § 77c(a)(10) (1982).

154. There are numerous no-action letters in which Rule 145 transactions qualified for an exemption from registration pursuant to § 3(a)(10), 15 U.S.C. § 77c(10) (1982). It was somewhat surprising to find so many types of situations and industries in which the fairness evaluations necessary for the § 3(a)(10) exemption were available. See, e.g., *CommerceAmerica Corp.*, SEC No-Action Letter (available Dec. 16, 1985) (LEXIS, Fedsec library, NoAct file) (fairness evaluation by Indiana banking agency for exchange of bank holding company stock for stock in the acquired company); *Arizona Silver Corp.*, SEC No-Action Letter (available June 26, 1985) (LEXIS, Fedsec library, NoAct file) (fairness evaluation by Canadian court for amalgamation in which shareholders of each company receive shares of the newly formed company in exchange for their shares in the amalgamated companies); *Oracle Corp.*, SEC No-Action Letter (available June 17, 1985) (LEXIS, Fedsec library, NoAct file) (fairness evaluation by California Corporations Department for exchange of subsidiary's stock with stock of parent); *Old Stone Corp.*, SEC No-Action Letter (available Dec. 19, 1984) (LEXIS, Fedsec library, NoAct file) (fairness evaluation by North Carolina Securities Deputy for acquisition of federal savings bank by exchanging shares of the holding company with shares of the savings bank); *Western Gulf Fin. Corp.*, SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file) (fairness evaluation by Texas Savings and Loan Commissioner for merger ultimately resulting in a savings and loan holding company configuration); *Gulf United Corp.*, SEC No-Action Letter (available Dec. 15, 1978) (LEXIS, Fedsec library,

145 transaction is required if only exempt securities are involved.¹⁵⁵

The transactional exemptions often require that the offerees and purchasers meet certain qualifications.¹⁵⁶ In evaluating these requirements, the characteristics of the voting shareholders who are to receive stock, rather than the characteristics of the acquired company that is a party to the merger, are relevant.¹⁵⁷ Thus, for example, if Alpha proposes to use Rule 506¹⁵⁸ to merge Beta into Alpha in a Rule 145 transaction in which the Beta shareholders will receive Alpha common stock, the availability of Rule 506 depends upon establishing that all Beta shareholders meet the sophistication or accredited investor requirements of Rule 506(b)(2)(ii).¹⁵⁹ Similarly, in calculating the maximum number of purchasers under Rule 505 or Rule 506,¹⁶⁰ one must include each Beta shareholder.

In judging the availability of these exemptions, however, the Commission does not take into consideration those shareholders relegated to cash only.¹⁶¹ Accordingly, in a merger effected under section 4(2), the private placement exemption,¹⁶² the sophistication requirements apply only to shareholders who are offered stock in the transaction, and the exemption is not lost if unsophisticated shareholders are relegated to cash.¹⁶³ The same line of reasoning should lead one calculating the maximum number of purchasers under Rule 505 or Rule 506 to exclude persons relegated to cash and should permit the use of Rule 147,¹⁶⁴ the intrastate exemption, in instances in which out-of-state shareholders are offered and receive only cash under the terms of the merger.

NoAct file) (fairness evaluation by Commissioner of Insurance of Alabama for statutory plan of exchange of subsidiary's stock for the parent's stock).

155. Subsections 2 through 7 of § 3(a) of the 1933 Act, 15 U.S.C. § 77c(a)(2)-(7) (1982), permit the sale of certain securities without registration under the 1933 Act. Of those exemptions, § 3(a)(2), which provides an exemption for securities issued by banks, and § 3(a)(5), which provides for an exemption for securities issued by savings and loan and certain other financial institutions, are probably the most likely to be available in a Rule 145 transaction, since other types of exempted securities typically are not involved in mergers and recapitalizations.

156. For example, qualification for an exemption pursuant to section 4(2) of the 1933 Act, 15 U.S.C. § 77d(2) (1982), requires that officers and purchasers have access to or be provided with all material information about the transaction. *See infra* note 166.

157. Rule 145 itself indicates as much. Section (a) of the Rule refers only to "the security holders of a corporation," not to the acquired company, in setting forth the rule on when an offer and sale occur. *See* 17 C.F.R. § 230.145 (a) (1987); *supra* note 1 for the text of Rule 145(a).

158. 17 C.F.R. § 230.506 (1987) (within Regulation D).

159. 17 C.F.R. § 230.506(b)(2)(ii) (1987); *see also* 17 C.F.R. § 230.501(a) (1987) (defining "accredited investor" for Regulation D purposes).

160. Subject to certain significant exceptions, Rule 505, 17 C.F.R. § 230.505(b)(2)(ii) (1987), and Rule 506, 17 C.F.R. § 230.506(b)(2)(i) (1987), limit the number of purchasers to 35.

161. *See infra* note 163.

162. 15 U.S.C. § 77d(2) (1982).

163. *See Baker Indus.*, SEC No-Action Letter (available Oct. 14, 1981) (LEXIS, Fed-sec library, NoAct file).

164. 17 C.F.R. § 230.147 (1987).

Issuers, especially small issuers, generally perceive significant advantages in avoiding the expense, inconvenience and delay of registering a Rule 145 transaction. It is clear to this Author, however, that the advantages of avoiding registration are often overestimated. The principal perceived source of expense and inconvenience in registration is the disclosure requirements. Qualifying for an exemption from registration, however, does not always remove the extensive disclosure requirements of the securities laws. Some of the exemptions, such as the private placement exemptions under Regulation D¹⁶⁵ and section 4(2),¹⁶⁶ require disclosure of the same information that is required in a registration statement. In other instances where disclosure is not a prerequisite for the availability of the exemption, such as under Rule 147¹⁶⁷ or section 3(a)(9),¹⁶⁸ the antifraud provisions of the 1933 and 1934 Acts¹⁶⁹ necessitate the disclosure of all material facts regarding the companies and the transaction. It is likely, therefore, that counsel will recommend (soundly, in this Author's opinion) that a disclosure document not unlike a Form S-4 be provided in connection with the transaction.¹⁷⁰

In light of those disclosure obligations, it may be erroneous to assume that one saves a significant amount of time by avoiding registration, although one does, obviously, eliminate the delay caused by the staff's review of the registration statement. Even that time savings, however, may be insignificant in many instances, since in recent years the staff has instituted a no-review policy for many 1933 Act filings. When the Commission chooses not to review a 1933 Act registration statement, the registration normally becomes effective within a week of filing.

Finally, one must consider the restrictions on resale of unregistered securities. Although this problem will be discussed in detail in Part II,¹⁷¹ unregistered securities often are subject to significant resale restrictions,¹⁷² while registered securities generally are freely tradable at any

165. 17 C.F.R. §§ 230.501 to .506 (1987). Offerings pursuant to Rule 505 or Rule 506 require disclosure as a prerequisite to the availability of the exemption unless the sales are limited to accredited investors. 17 C.F.R. § 230.502(b)(1) (1987).

166. Although some uncertainty still surrounds the exemption provided by § 4(2), 15 U.S.C. § 77d(2) (1982), it is now generally recognized that the offerees and purchasers must be provided with the same kind of information that would otherwise be contained in a registration statement. See, e.g., Schwartz, *The Private Offering Exemption—Recent Developments*, 37 Ohio St. L.J. 1, 17 (1976). But cf. Schneider, *The Statutory Law of Private Placements*, 14 Rev. Sec. Reg. 869, 877-79 (1981) (arguing that offerees need not be provided information "as extensive in scope and detail" as the information required in a Form S-1).

167. 17 C.F.R. § 230.147 (1987) (intrastate exemption).

168. 15 U.S.C. § 77c(a)(9) (1982) (exchange by issuer of one security for another with existing security holders).

169. Section 12(2) under the 1933 Act, 15 U.S.C. § 771(2) (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1987) are the most formidable of the antifraud provisions.

170. See the discussion in Campbell, *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. Corp. L. 553, 561 (1985).

171. See *infra* notes 226-375 and accompanying text.

172. See *infra* notes 292-312, 315-16, 321-27, 328-41, 344-60 and accompanying text.

time after the initial offering by the issuer.

Accordingly, although there are certainly instances in which it is advantageous to avoid registration, this Author cautions against an automatic aversion to registration of Rule 145 transactions. Instead, one must evaluate each situation closely, understanding that in some instances the difference in the amount of disclosure, delay and cost may be insignificant, and that any slight advantage gained may be outweighed by countervailing factors.

2. Announcements and Statements During A Rule 145 Transaction

It is often appropriate or even necessary for firms involved in mergers and other Rule 145 transactions to announce the transaction, refer in a statement to the transaction or engage in conduct that has a positive impact on the ability to complete the transaction.¹⁷³ If the announcement or conduct is considered an "offer" of the Rule 145 stock,¹⁷⁴ the registration provisions of the 1933 Act are applicable. This creates problems for the parties involved in the Rule 145 transaction, since it may be impossible to structure the offer (that is, the announcement) in a way that meets the registration requirements of the 1933 Act.¹⁷⁵

Rule 145(b) contains a safe harbor provision for the announcement of a Rule 145 transaction.¹⁷⁶ Under its terms, no offer is involved if the announcement does no more than identify the parties to the Rule 145 transaction, briefly describe their business and the transaction, and give basic information about the shareholders' meetings to be held.

It is clear that Rule 145(b) is not the exclusive source of criteria for permissible announcements of a Rule 145 transaction.¹⁷⁷ Rule 134¹⁷⁸

173. For examples of such situations, see *infra* notes 185-86 and accompanying text.

174. "Rule 145 stock" refers to securities received in a Rule 145 transaction.

175. Unless an exemption from registration is applicable, § 5(c) of the 1933 Act makes it illegal to offer securities prior to the filing of a registration statement with the Commission. See 15 U.S.C. § 77e(c) (1982). Under § 5(b) of the 1933 Act, any written offer of a security is illegal after a registration statement has been filed unless the offer is accompanied by a prospectus. See 15 U.S.C. § 77e(b) (1982). Of course, a mere announcement could never contain all the information that is required in a prospectus.

176. See 17 C.F.R. § 230.145(b) (1987). For the text of Rule 145(b), see *supra* note 1.

177. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part II, Illustration F, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-6 to -7 (Feb. 28, 1974). To qualify for the safe harbor of Rule 145(b), however, the announcement must meet all the requirements of the Rule and must not include information outside the expressly authorized categories. Thus in *Chris-Craft Indus. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970), the court held Rule 135, 17 C.F.R. § 230.135 (1987), which describes communications not deemed an offer, unavailable for an announcement containing unauthorized information. See *Chris-Craft*, 426 F.2d at 574. The legitimacy of such announcements would depend, therefore, upon whether an offer was involved under case law interpretations. See *infra* text accompanying notes 183-87.

178. 17 C.F.R. § 230.134 (1987) (rule describing communications not deemed a prospectus).

and Rule 135¹⁷⁹ are the most obvious alternatives for such announcements, although it may be difficult to construct a useful announcement within the limits of Rule 134,¹⁸⁰ and the provisions of Rule 135 are probably no more liberal than those of Rule 145(b).¹⁸¹ In addition to these three Rules, the Commission, through its releases and no-action letters, has provided substantial guidance concerning conduct or announcements that constitute offers.¹⁸² One must, therefore, ensure that any announcement exceeding the limits of Rule 145(b), Rule 134 or Rule 135 is not an offer within these Commission pronouncements.

As a general matter, it appears that the Commission uses an intent or purpose test to determine the existence of an offer.¹⁸³ Thus, if an announcement is intended to facilitate the issuance of stock in the Rule 145 transaction, the Commission would conclude that the announcement is an offer. On the other hand, if the announcement serves a purpose independent of the Rule 145 transaction, it will not be considered an offer.¹⁸⁴

This analysis is the basis for the Commission's conclusion that an issuer in registration may continue to advertise its products, send periodic reports and proxy information to shareholders, issue press releases regarding factual business and financial developments and respond to unsolicited inquiries for information.¹⁸⁵ Although in each of these instances

179. 17 C.F.R. § 230.135 (1987) (rule describing statements that may be made by an issuer before registration and that are not deemed to be offers).

180. The permitted categories of information under Rule 134 are unresponsive to the needs of companies involved in Rule 145 transactions because Rule 134 does not allow disclosure of any information regarding the companies as merged. *See* 17 C.F.R. § 230.134(a) (1987).

181. Unlike Rule 134, Rule 135 specifically provides for announcements regarding the "exchange for other securities of the issuer or of another issuer." 17 C.F.R. § 230.135(a)(4) (1987).

182. *See infra* notes 185-86 and accompanying text.

183. *See generally* Interpretive Releases, Publication of Information Prior to or After Effective Date of Registration Statement, Securities Act Release No. 33-3844, 1 Fed. Sec. L. Rep. (CCH) ¶¶ 3250-3256, at 3147-52 (Oct. 8, 1957). The factual examples in particular suggest that the Commission tries to determine the true intent of the party making the announcement. *See id.* ¶ 3256, at 3150-51.

184. Alma Sec. Corp., SEC No-Action Letter (available Aug. 2, 1982) (LEXIS, Fedsec library, NoAct file), provides a good example. Alma Securities inquired whether publication of a tombstone ad announcing the completion of a Regulation D offering would constitute an offer. Although the Commission refused to opine on the request, it indicated that such an ad would be permissible "following the completion of an isolated Regulation D offering where the advertisement would have no immediate or direct bearing on contemporaneous or subsequent offers or sales of securities." *Id.* On the other hand, the Commission indicated that an offer would be involved if the issuer were involved in multiple programs and announced the completion of each deal. *Id.* The implicit reasoning appears to be that the purpose for such announcements would be to advertise future programs and thus offer the securities involved in those future programs.

185. *See* Guidelines for the Release of Information by Issuers Whose Securities are in Registration, Securities Act Release No. 33-5180, 1 Fed. Sec. L. Rep. (CCH) ¶ 3056, at 3064 (Aug. 16, 1971); Publication of Information Prior to or After the Filing and Effective Date [sic] of a Registration Statement Under the Securities Act, Securities Act Re-

the statements or responses of the company may have a favorable impact on the company's ability to sell its stock or complete the Rule 145 transaction, the statements have an independent and legitimate purpose.

For similar reasons, the Commission indicated that, in the context of a merger transaction under Rule 145, no offer was involved in an announcement that contained, in addition to the items enumerated in Rule 145(b), a statement of an intent to liquidate a subsidiary and other assets after the completion of the merger.¹⁸⁶ The legitimate purpose for such a statement, according to the Commission, was the satisfaction of the company's obligation to disclose material information.¹⁸⁷

In light of this, one involved in a Rule 145 transaction should be able to make a complete announcement of all material facts surrounding the transaction, including, in addition to plans to liquidate assets as described above, any plans regarding changes in senior management or the board of directors of the surviving company, changes in corporate structure, financing of the acquisition and any anticipated consolidation or elimination of operations. So long as an announcement is limited to the disclosure of material facts, the courts and the Commission should not consider the announcement to be an offer, even if such announcement exceeds Rule 145(b), since the purpose of the announcement is to fulfill the parties' disclosure obligations.

3. Tender Offer to Facilitate a Merger

In a friendly acquisition that is to be structured as a stock-for-stock merger, the acquiring company may, after the merger has been approved by the acquired company's directors but before the final shareholder vote, make a cash tender for part or all of the acquired company's voting stock. This technique may be attractive to the acquiring company, since it allows part of the acquisition to be made for cash and helps ensure shareholder approval.¹⁸⁸ The tender also benefits shareholders of the acquired company by allowing them a cash-out option.

In such instances, the concern arises that the announcement of the cash tender might be considered an offer of the stock to be issued to the

lease No. 33-5009, 1 Fed. Sec. L. Rep. (CCH) ¶ 1465, at 2134 (Oct. 6, 1969); Publication of Information Prior to or After Effective Date of Registration Statement, Securities Act Release No. 33-3844, 1 Fed. Sec. L. Rep. (CCH) ¶ 3250, at 3147 (Oct. 8, 1957).

186. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part 3, Illustration, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-7 (Feb. 28, 1974).

187. See *id.*

188. The ability to bring some stability or certainty to these situations may become even more imperative after a case like *ConAgra, Inc. v. Cargill, Inc.*, 222 Neb. 136, 382 N.W.2d 576 (1986), which makes the impact of definitive merger agreements more uncertain. In *ConAgra*, the board of directors signed a definitive merger agreement but subsequently repudiated it when they received a higher bid. See *id.* at 138, 382 N.W.2d at 577. The court found no liability for the repudiation of the terms of the merger agreement, concluding, apparently, that the board's fiduciary duty overrode the contract. See *id.* at 156, 382 N.W.2d at 587-88.

acquired company's shareholders in the merger. The Commission unfortunately has given inconsistent responses to this problem.

In the *Bendix Corp.* no-action letter,¹⁸⁹ Bendix, which had agreed to acquire Ex-Cell-O in a merger in exchange for Bendix stock, proposed to make a cash tender for the Ex-Cell-O stock prior to the completion of the merger. The staff was "unable to concur in [Bendix's] opinion that the Tender Offer [did] not constitute an 'offer to sell' " the Bendix stock that was to be issued in the merger, because the shareholders were "being asked to make an investment decision" whether to take "the cash now or the stock later."¹⁹⁰ One year later, however, the Commission reached what appears to be the opposite result in the *United Technologies Corp.* no-action letter,¹⁹¹ concluding that such a cash tender, preceding the completion of a merger involving a stock exchange, did not constitute an offer of the stock to be issued in the merger.

The Commission's response in the *United Technologies Corp.* no-action letter is correct. As described in the immediately preceding section, the Commission over the years has applied a purpose or intent test to determine whether an announcement or action constitutes an offer.¹⁹² An announcement of a cash tender offer has a legitimate and independent purpose other than to condition the market for the stock offering that will occur in the merger. Although the announcement of the cash tender may in fact have a beneficial impact on the ability to complete the merger and to issue the acquiring company's stock, the independent purpose of the tender is to facilitate the completion of the acquisition by allowing the acquiring company to stabilize the situation. This independent purpose should be sufficient to avoid inclusion of the cash tender in the definition of offer.¹⁹³

4. Regulatory Concessions, Including Waiver of Financial Statements Requirements

Certain Rule 145 transactions may result in a new issuer without any significant changes in the corporation or the rights of shareholders. An example of this is a triangular merger effected solely for the purpose of interposing a holding company between the shareholders and the operat-

189. SEC No-Action Letter (available Mar. 30, 1977) (LEXIS, Fedsec library, NoAct file).

190. *Id.*

191. SEC No-Action Letter (available Apr. 24, 1978) (LEXIS, Fedsec library, NoAct file). In *United Technologies*, it was clear that the tender was subject to the disclosure requirements of the tender offer rules of the 1934 Act. *See id.* In the *Bendix* situation, on the other hand, there is no indication in the correspondence that the proposed tender was subject to the tender offer rules of the 1934 Act. *See The Bendix Corp.*, SEC No-Action Letter, (available Mar. 30, 1977) (LEXIS, Fedsec library, NoAct file). The significance, if any, of this difference is not clear from the letters.

192. *See supra* notes 183-84.

193. *See supra* notes 183-87 and accompanying text.

ing company, with no other changes in shareholders' rights.¹⁹⁴ Additionally, no-sale transactions often result in a new issuer without any significant substantive change to shareholders. An example of this is a merger effectuated under the change-in-domicile exemption of Rule 145(a)(2).¹⁹⁵

In these situations, the Commission has allowed certain regulatory concessions, recognizing that the insignificance of the transactions justifies such treatment. Specifically, the Commission has (a) allowed the successor company, pursuant to Rule 414,¹⁹⁶ to adopt the 1933 Act registration statement of its predecessor,¹⁹⁷ (b) allowed a successor company that could not qualify for Rule 414 treatment to register the successor company's continuing stock option plan by amending the Form S-4 used to effect the merger,¹⁹⁸ (c) allowed the continued availability of the Rule 16b-3 exemption¹⁹⁹ from the 1934 Act's section 16(b)²⁰⁰ liability of directors, officers and principal stockholders, without a new approval by the shareholders of the successor corporation,²⁰¹ (d) affirmed the availability of the Rule 16b-7²⁰² exemption of the 1934 Act for certain acquisitions and dispositions of securities pursuant to a merger or consolidation,²⁰³ (e) affirmed that Rule 12g-3²⁰⁴ of the 1934 Act may relieve the successor from filing a new 1934 Act registration statement, although a filing of a Form 8-K²⁰⁵ or Form 6-K was required to reflect the succession,²⁰⁶ (f) affirmed that the actions and characteristics of a predecessor company were considered in determining the availability to a successor com-

194. See *supra* notes 76-83 and accompanying text.

195. See *supra* notes 26-42 and accompanying text.

196. 17 C.F.R. § 230.414 (1987).

197. See, e.g., Sunsav, Inc., SEC No-Action Letter (available Feb. 28, 1986) (LEXIS, Fedsec library, NoAct file); Ivy Fund, SEC No-Action Letter (available Mar. 5, 1984) (LEXIS, Fedsec library, NoAct file); The Limited Stores, SEC No-Action Letter (available May 12, 1982) (LEXIS, Fedsec library, NoAct file); Good and Bad Times Fund, SEC No-Action Letter (available Mar. 1, 1982) (LEXIS, Fedsec library, NoAct file).

198. See, e.g., DPL Inc., SEC No-Action Letter (available May 16, 1986) (LEXIS, Fedsec library, NoAct file); Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file).

199. 17 C.F.R. § 240.16b-3 (1987).

200. 15 U.S.C. § 78p(b) (1982).

201. See, e.g., Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file); The Limited Stores, SEC No-Action Letter (available May 12, 1982) (LEXIS, Fedsec library, NoAct file); Household Fin. Corp., SEC No-Action Letter (available July 2, 1981) (LEXIS, Fedsec library, NoAct file).

202. 17 C.F.R. § 240.16b-7 (1987).

203. See, e.g., DPL Inc., SEC No-Action Letter (available May 16, 1986) (LEXIS, Fedsec library, NoAct file); Household Fin. Corp., SEC No-Action Letter (available July 2, 1981) (LEXIS, Fedsec library, NoAct file).

204. 17 C.F.R. § 240.12g-3 (1987).

205. See 17 C.F.R. § 249.308 (1987). Form 8-K is filed by a 1934 Act reporting company to disclose extraordinary corporate developments.

206. See, e.g., The Limited Stores, SEC No-Action Letter (available May 12, 1982) (LEXIS, Fedsec library, NoAct file); David Minerals Ltd., SEC No-Action Letter (available Sept. 3, 1981) (LEXIS, Fedsec library, NoAct file).

pany of certain registration forms under the 1933 Act,²⁰⁷ (g) affirmed that for the purposes of determining the public availability of information under Rule 144(c),²⁰⁸ the reporting status of the predecessor was considered,²⁰⁹ and (h) conceded that insiders of the predecessor who become insiders of the successor are not required to file a new Form 3²¹⁰ pursuant to section 16(a) of the 1934 Act.²¹¹

In addition, in certain Rule 145 transactions²¹² the Commission has waived the requirement for disclosure of financial information that may otherwise be necessary in registered and exempt offerings.²¹³ Although the Commission's views continue to be somewhat inscrutable, it seems that the Commission has limited such waivers to instances in which disclosure of financial information is unnecessary for an informed investment judgment.

In one instance, for example, the Commission permitted the omission of financial information if the Rule 145 transaction involved "only the [issuer] and one or more of its totally held subsidiaries . . ."²¹⁴ In no-action letters, however, the Commission eased the structural limitations of this provision, and, for example, in the *GEO Int'l Corp.* no-action let-

207. See, e.g., DPL Inc., SEC No-Action Letter (available May 16, 1986) (LEXIS, Fedsec library, NoAct file); Household Fin. Corp., SEC No-Action Letter (available July 2, 1981) (LEXIS, Fedsec library, NoAct file); Rochester Telephone Corp., SEC No-Action Letter (available July 14, 1977) (LEXIS, Fedsec library, NoAct file).

208. 17 C.F.R. § 230.144(c) (1987).

209. See, e.g., The Limited Stores, SEC No-Action Letter (available May 12, 1982) (LEXIS, Fedsec library, NoAct file); FirstMark, Inc., SEC No-Action Letter (available April 27, 1981) (LEXIS, Fedsec library, NoAct file).

210. When persons become officers, directors or 10% shareholders of companies registered under the 1934 Act, they are required to file a Form 3 with the Commission. See Rule 16a-1, 17 C.F.R. § 240.16a-1 (1987).

211. 15 U.S.C. § 78p(a) (1982); see DPL, Inc., SEC No-Action Letter (available May 16, 1986) (LEXIS, Fedsec library, NoAct file); Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file).

212. See *infra* text accompanying notes 214-16, 219-25.

213. Under the terms of Regulation D, for example, it is often necessary to supply the offerees and purchasers with the same type of information that is contained in a registration statement. See 17 C.F.R. § 230.502(b) (1987). Most commentators agree that the Section 4(2) exemption, 15 U.S.C. § 77d(2) (1982), also requires the disclosure of the same type of information that would be contained in a registration statement. See, e.g., T. Hazen, *The Law of Securities Regulation* 131 (1985); Schwartz, *The Private Offering Exemption—Recent Developments*, 37 Ohio St. L.J. 1, 17 (1976). At least one commentator, however, takes a somewhat different position on the matter. Schneider, *The Statutory Law of Private Placements*, 14 Rev. Sec. Reg. 869, 878 (1981) ("issuer need only provide general categories of registration statement information rather than information precisely identical to that disclosed through the registration process").

214. Schedule 14A, 17 C.F.R. § 240.14a-101, Item 14(c)(4) (1987). Form S-14, the predecessor to Form S-4, incorporated the proxy rules by reference. See Form S-14, 17 C.F.R. § 239.23 (1985). Under the incorporated proxy rules, companies were relieved of financial disclosure requirements if the Rule 145 transaction involved "only the [issuer] and one or more of its totally owned subsidiaries." 17 C.F.R. § 240.14a-101, Item 14(c)(4) (1987).

ter,²¹⁵ waived the requirements for financial statements in a merger between an operating company and a new shell company formed and owned by management of the operating company. Similarly, in the *Raybestos-Manhattan, Inc.* no-action letter,²¹⁶ an omission of financial statements was permitted when an operating company was merged into a subsidiary of a newly formed holding company.

Both of the foregoing no-action requests, however, involved no amalgamations of assets between independent companies and involved no material changes in the contractual rights of shareholders, although the transactions were structured as mergers.²¹⁷ Apparently, the Commission concluded that financial statements were not required for an informed business judgment and thus waived the requirement, even though the transactions exceeded the Commission's promulgated position.

Technically, this waiver provision is no longer available for Rule 145 transactions.²¹⁸ Nonetheless, as suggested below, the fundamental notion underlying the waiver, that no financial disclosures should be required where rights of shareholders are not materially changed, continues to be significant for the availability of waivers for financial information.

Another basis for waiver of financial information is Staff Accounting Bulletin No. 50 ("SAB 50"),²¹⁹ which deals with the financial requirements applicable to a "phantom bank" transaction. Typically, these transactions involve triangular mergers in which a holding company and its wholly-owned subsidiary are formed by the management of the operating bank, and the operating bank is then merged with the holding com-

215. SEC No-Action Letter (available April 6, 1987) (LEXIS, Fedsec library, NoAct file).

216. Raybestos-Manhattan, Inc., SEC No-Action Letter (available June 25, 1982) (LEXIS, Fedsec library, NoAct file).

217. See *id.*; GEO Int'l, SEC No-Action Letter (available April 6, 1987) (LEXIS, Fedsec library, NoAct file).

218. When the Commission adopted Form S-4, it chose not to incorporate the proxy rules into the Form. Thus the basis for the waiver has been eliminated, and the new financial disclosure rules, which are contained in Regulation S-K, 17 C.F.R. §§ 229.10 to .802 (1987), and Regulation S-X, 17 C.F.R. §§ 210.1-01 to .12-29 (1987), do not provide similar waiver provisions.

There still are certain merger transactions that can qualify for the waiver provided by the proxy rules. For example, if a company that is reporting under the 1934 Act effects a merger solely to change its domicile, the change-in-domicile exception of Rule 145(a)(2) will except the transactions from the 1933 Act requirements. See 17 C.F.R. § 230.145(a)(2) (1987); see also *supra* notes 25-42 and accompanying text. The solicitations of proxies, however, will remain subject to the proxy rules of the 1934 Act and will be permitted to omit financial information if the transaction is structured as a parent/subsidiary merger. Most change-in-domicile mergers are structured in this manner. See, e.g., Caterpillar Tractor, Co., No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); American Bldg. Maintenance Indus., No-Action Letter (available March 11, 1985) (LEXIS, Fedsec library, NoAct file); Rowe Furniture Corp., No-Action Letter (available Jan. 22, 1985) (LEXIS, Fedsec library, NoAct file).

219. Staff Accounting Bulletin No. 50, 6 Fed. Sec. L. Rep. (CCH) ¶ 74050, adding Section F to Topic I: Financial Statements, ¶ 74,101, at 63,554 (Mar. 3, 1983).

pany subsidiary. Although, as previously stated, the Commission treats these transactions as sales of the holding company stock to the shareholders of the operating bank,²²⁰ the Commission concluded in SAB 50 that no financial statements are required for the transaction if the shareholders' relative equity ownership remains unchanged after the transaction, if only nominal debt is incurred in the transaction and if the shareholders have been furnished or are furnished financial statements for the latest fiscal year.²²¹

The staff has indicated to this Author that SAB 50, notwithstanding its language, is not limited to bank holding companies but instead is available for all transactions that fit within its terms.²²² Further, pursuant to Rule 3-13 of Regulation S-X,²²³ the Commission is prepared to treat requests for relief from financial disclosure requirements on a case-by-case basis.²²⁴ Finally, in deciding on such requests, the Commission will rely heavily on the letter and the spirit of SAB 50.²²⁵

All of this seems to indicate a willingness on the part of the Commission to waive the financial disclosure requirements in Rule 145 transactions that, although considered by the Commission to involve sales of securities, do not involve material changes in the rights of the shareholders involved. The absence of any material changes at the corporate level, such as an amalgamation of assets or the addition of any new, material debt, and the absence of any change in the contractual rights of shareholders appear to be prerequisites to such a waiver. SAB 50, the prior position of the Commission, and the no-action letters described above should provide useful guides in obtaining such waivers from the Commission.

II. REALES OF RULE 145 STOCK

The problems relating to Rule 145 are not limited to determining whether a transaction by the issuer constitutes a sale. Shareholders wishing to resell their stock acquired in a Rule 145 transaction also face numerous obstacles.

A. Generally

Questions regarding resales of securities by non-issuers generally are

220. See *supra* notes 76-85 and accompanying text.

221. See Staff Accounting Bulletin No. 50, 6 Fed. Sec. L. Rep. (CCH) ¶ 74050, adding Section F to Topic I: Financial Statements, ¶ 74,101, at 63,554 (Mar. 3, 1983). SAB 50 also requires that no new classes of stock be authorized or issued, and that there be no material changes in the condition of the bank. See *id.*

222. Telephone interview with SEC staff attorney (Aug. 1, 1986).

223. 17 C.F.R. § 210.3-13 (1987). This regulation allows the Commission "upon the informal written request of the registrant, and where consistent with the protection of investors" to permit the omission of part or all of the required financial statements.

224. Telephone interview with SEC staff attorney (Aug. 1, 1986).

225. *Id.*

determined by reference to section 4(1) of the 1933 Act,²²⁶ which exempts from registration sales by persons other than issuers, underwriters, and dealers.²²⁷ Most sales by shareholders, therefore, are exempt from registration, since the typical shareholder is not included in any of those definitions.

There are, however, instances in which a shareholder falls within the definition of underwriter²²⁸ and thus loses the section 4(1) exemption.²²⁹ Typically, the part of the underwriter definition that defines an underwriter as one "who has purchased from an issuer with a view to . . . distribution"²³⁰ is most inclusive and thus most troublesome for shareholders selling Rule 145 stock.

B. *Resales Following a No-Sale Transaction*

A shareholder who receives stock in a transaction that does not constitute a sale ("no-sale transaction") should not be considered an underwriter, even if he resells his stock publicly. While such a selling shareholder certainly would be involved in a "distribution,"²³¹ he did not acquire his security in a sale and thus should not be considered as having purchased a security from the issuer. As a result, the shareholder does not fit into the underwriter definition, since he is not one "who purchased" a security, and his section 4(1) exemption is preserved.

The Commission seems to accept this fairly obvious analysis and accordingly has concluded that securities acquired by shareholders in a change-in-domicile transaction under Rule 145 become freely transferable in the hands of the shareholders of the newly incorporated company.²³² A similar result should also be reached in any other no-sale transaction, such as transactions involving immaterial changes in the

226. 15 U.S.C. § 77d(1) (1982).

227. *Id.*

228. Section 2(11) of the 1933 Act defines "underwriter." See 15 U.S.C. § 77b(11) (1982).

229. A shareholder's right to sell securities also may be limited when he is included in the definition of "issuer." Typically this occurs when the shareholder controls the issuer of the securities. See 15 U.S.C. § 77c(a)(11) (1982); see also *infra* notes 373-76 and accompanying text.

230. 15 U.S.C. § 77b(11) (1982). The complete definition of an underwriter in section 2(11), 15 U.S.C. § 77b(11) (1982), is more expansive, but the quoted provision is most relevant to resales by shareholders.

231. "Distribution" is considered to be synonymous with "public offering." See Wheat Report SEC Disclosure Group, Securities and Exchange Commission, Disclosure to Investors—A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts 161-62 (CCH) (1969) (hereinafter "Wheat Report"); 1 L. Loss, *supra* note 3, at 551; Orrick, *Some Interpretative Problems Respecting the Registration Requirements Under the Securities Act*, 13 Bus. Law. 369, 370 (1958).

232. See, e.g., Applied Materials, Inc., SEC No-Action Letter (available Apr. 16, 1987) (LEXIS, Fedsec library, NoAct file); The Times Mirror Co., SEC No-Action Letter (available Feb. 14, 1986) (LEXIS, Fedsec library, NoAct file); URS Corp., SEC No-Action Letter (available Apr. 8, 1976) (LEXIS, Fedsec library, NoAct file).

rights of shareholders,²³³ stock splits²³⁴ and certain changes in the issuer's form of entity.²³⁵

As a corollary, the Commission has concluded that a no-sale transaction cannot cleanse a restriction.²³⁶ Thus, for example, if a shareholder exchanges a restricted security for a new security in a no-sale transaction, the new security carries the same restriction as the old security. Although the Commission announced this notion with regard to securities restricted by Regulation D or section 4(2),²³⁷ the same rule should apply to securities subject to the resale limitations of Rule 147.²³⁸ In either instance, the absence of a sale means that the status of the shares and the shareholder is unchanged.

C. *Resales of Rule 145 Stock Acquired in a Registered Rule 145 Transaction*

Securities purchased by investors in a registered Rule 145 offering ("registered Rule 145 stock") generally are freely transferable pursuant to the exemption provided by section 4(1),²³⁹ since such selling shareholders usually are considered to be outside the definitions of issuer, underwriter or dealer. This is not, however, always the case, and difficult questions can arise, especially regarding the selling shareholder's status as an underwriter.

The definition of an underwriter in section 2(11) of the 1933 Act includes a person who "purchased from an issuer with a view to . . . distribution"²⁴⁰ One problem with this definition is that an extreme interpretation could result in underwriter status for persons who resell registered Rule 145 stock in market transactions.

Assume, for example, that Alpha Company acquires Beta Company in a registered Rule 145 transaction and pays for the acquisition by issuing Alpha's common stock to the Beta shareholders. If a Beta shareholder, who previously owned one hundred shares of Beta stock, receives one hundred shares of the registered Alpha stock and sells the Alpha stock in a market transaction shortly after the acquisition, the selling shareholder might be considered an underwriter for two reasons. First, clearly the selling shareholder purchased his Alpha stock from the issuer.²⁴¹ Sec-

233. See *supra* notes 50-75 and accompanying text.

234. See *supra* note 20 and accompanying text.

235. See *supra* notes 43-49 and accompanying text.

236. See *The Times Mirror Co.*, SEC No-Action Letter (available Feb. 14, 1986) (LEXIS, Fedsec library, NoAct file); *URS Corp.*, SEC No-Action Letter (available Apr. 8, 1976) (LEXIS, Fedsec library, NoAct file).

237. See *supra* note 236.

238. 17 C.F.R. § 230.147 (1987). In *The URS Corp.* no-action letter, the staff stated that the "shares transferred to shareholders . . . will be subject to no greater restrictions . . . than were applicable to the shares exchanged therefor." SEC No-Action Letter (available Apr. 8, 1976) (LEXIS, Fedsec library, NoAct file).

239. 15 U.S.C. § 77d(1) (1982).

240. 15 U.S.C. § 77b(11) (1982).

241. See 17 C.F.R. § 230.145(a) (1987). For the text of Rule 145 see *supra* note 1.

ond, because the resale through a broker involves an offer to all bidders, it would appear that the sale would be public and thus would constitute a distribution of the stock by the selling shareholder.²⁴² The selling shareholder, therefore, seems to fit the definition of an underwriter, since he "purchased from an issuer with a view to . . . distribution" ²⁴³

Such an extreme interpretation, however, would place unnecessary burdens on shareholders desiring to sell registered Rule 145 stock. Such shareholders, for example, would be required to comply with the prospectus delivery requirements²⁴⁴ each time they executed a market sale of the registered Rule 145 stock, no matter how few shares are involved. Clearly the difficulties of such compliance for small shareholders would outweigh any benefits to purchasers or the public resulting from such disclosure.

On the other hand, if a shareholder sells one hundred thousand shares of Alpha stock instead of the one hundred shares previously assumed, one may be less reluctant to consider the shareholder an underwriter. The size of that sale makes the case for disclosure more compelling and the relative cost and difficulty of disclosure less significant. Conceptually, however, it is nearly impossible to distinguish the two situations. Both the large and the small shareholder seem to fit the definition of an underwriter, since each purchased securities from an issuer and resold them publicly shortly after the purchase. Both, therefore, appear to have "purchased" with a view to "distribution."²⁴⁵

Over the years, the Commission has struggled with this problem outside the setting of Rule 145 transactions. Essentially, the Commission has attempted to permit free transferability of registered shares unless the selling shareholder's purchase from the issuer is sufficiently large to make it appropriate for the selling shareholder to comply with the prospectus delivery requirements.²⁴⁶ One commentator reported that the Commission at one time "applied a rule of thumb" defining an underwriter to include only persons who purchased "10 percent of the issue."²⁴⁷

In a registered Rule 145 transaction, however, underwriter status for a selling shareholder is determined, apparently exclusively,²⁴⁸ under Rule

242. See L. Loss, *supra* note 74, at 280.

243. 15 U.S.C. § 77b(11) (1982).

244. See 15 U.S.C. § 77e(c) (1982).

245. 15 U.S.C. § 77b(11) (1982).

246. See L. Loss, *supra* note 74, at 279-80.

247. *Id.*

248. The matter of exclusivity is not entirely clear, although the language of a no-action letter supports an exclusivity interpretation. See Coastal Int'l, SEC No-Action Letter (available Dec. 24, 1980) (LEXIS, Fedsec library, NoAct file) (stating that "securities received in a Rule 145 transaction by persons who are neither affiliates of the acquired company nor of the acquiring company are registered securities without restriction on resale," which language suggests that affiliate status, a Rule 145 test, is determinative). The Commission has indicated, however, that other persons involved in facilitating mergers might be considered underwriters in certain instances. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act

145(c).²⁴⁹ Pursuant to that provision, "an affiliate [("Rule 145 affiliate")] of . . . [a] party" to the Rule 145 transaction is considered an underwriter if he or she "publicly offers or sells" registered Rule 145 stock.²⁵⁰

"Affiliate" includes a control person.²⁵¹ While the definition of control is both complex and uncertain, it may include anyone who either owns or controls ten percent of the voting stock of a company, holds a significant managerial position in the company or has a substantial relationship with either of the foregoing.²⁵² This conclusion is consistent with Commission no-action letters on the subject.²⁵³

The conservative practice, therefore is to consider at least all of the acquired company's ten-percent shareholders,²⁵⁴ directors and senior management and all members of the immediate family of all the forego-

Release No. 5463, Section IV, Illustration B, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-68 (Feb. 28, 1974).

In addition, it is not clear whether the Commission would apply its one-percent rule to resales of registered Rule 145 stock. Under the one-percent rule, the Commission attempts to apply resale restrictions to persons acquiring more than one percent of a company's outstanding stock in a Rule 145 transaction. Apparently, this is based on the concept that such persons become underwriters. The Commission applies this one-percent rule for resales of Rule 145 stock acquired in certain exempt Rule 145 transactions. See *infra* notes 306-13 and accompanying text.

249. 17 C.F.R. § 230.145(c) (1987) (provision of Rule 145 defining persons deemed to be underwriters under the Rule). For the text of Rule 145(c) see *supra* note 1.

250. *Id.*

251. See 17 C.F.R. § 230.405 (1987).

252. See Campbell, *Defining Control in Secondary Distributions*, 18 B.C. Ind. & Com. L. Rev. 37, 49 (1976).

253. Although the Commission professes not to give no-action positions on the question of control, see South Carolina Nat'l, SEC No-Action Letter (available Apr. 21, 1975) (LEXIS, Fedsec library, NoAct file) (even that letter, however, seemed to give some advice on the matter), there are no-action letters dealing directly with the question of whether persons associated with acquired companies constitute "affiliates" under Rule 145(c). See, e.g., Galbo, Vincent A., SEC No-Action Letter (available Sept. 22, 1977) (LEXIS, Fedsec library, NoAct file) (the staff was unable to conclude that one who owned 3.8% of voting stock and was a director and member of executive committee was not an affiliate); Norton Simon, Inc., No-Action Letter (available Oct. 8, 1976) (LEXIS, Fedsec library, NoAct file) (staff was unable to conclude that Sidney Factor and Dorothy Factor were not affiliates, where he owned 1.2% of the company's stock, served as director and previously served as senior vice president and member of executive committee, and relatives, trusts and a charitable foundation of which such relatives were trustees owned 20%); Uniservice Corp., SEC No-Action Letter (available Aug. 13, 1976) (LEXIS, Fedsec library, NoAct file) (the staff was "of the view that [one] may be deemed to be an affiliate" where he was a director and owned stock, his law firm was counsel to company, and he served as secretary to the company); Great N. Nekoosa Corp., SEC No-Action Letter (available May 20, 1976) (LEXIS, Fedsec library, NoAct file) ("Mrs. Lake may be deemed an affiliate," since she owned 10%, and "her husband, children, grandchildren and a trust created by her collectively owned approximately 30%").

254. Some practitioners also assume that the Commission's one-percent rule may restrict resales of securities by persons receiving one-percent of the shares offered in a registered Rule 145 transaction. For an example see § 7.10 of the Acquisition Agreement between Bank of Boston Corporation and Colonial Bancorp, Inc., 3 H. Deutch, *Proxy Statements: Strategy and Forms* § 12.101, at 12-194 (1985). It is not clear, however, that the Commission would attempt to apply its one-percent rule to such transactions. See *supra* note 248; *infra* notes 306-13 and accompanying text.

ing, as control persons. As a result, numerous shareholders of the acquired company, including those receiving relatively small amounts of registered Rule 145 stock, may be, and typically are, caught in the definition of control and thus may be subject to underwriter status under Rule 145(c).

Such a result is obviously inappropriate. In the first place, it is unfair to saddle persons holding small amounts of registered Rule 145 stock with underwriter status. Second, the definition of underwriter in Rule 145(c) addresses the legitimate concern of the Commission only in an indirect and haphazard fashion. As stated earlier, the Commission legitimately is concerned with controlling large resales of registered Rule 145 stock.²⁵⁵ In determining whether such resales are of sufficient size to justify application of some limitation, the Commission should look either to the absolute dollar amount of the resales or to the amount of resales relative to the total outstanding shares of the acquiring company. Either of these approaches would address the problem directly. Whether one had a control relationship with the acquired company, on the other hand, seems at best indirectly related to the problem.

Notwithstanding these significant flaws in the Commission's definition of underwriter in Rule 145(c), a number of alternatives exist for Rule 145 affiliates who wish to resell their securities. One alternative is to register the securities for resale, and, in that regard, the Commission has provided two methods to facilitate such registered resales. First, the initial registration statement may provide for the resales by Rule 145 affiliates.²⁵⁶ In such instances, the acquiring company's registration statement must include information about any Rule 145 affiliate that proposes to resell stock,²⁵⁷ and the selling affiliate must comply with the prospectus delivery requirements.²⁵⁸

If, however, the Rule 145 affiliate is uncertain as to whether a resale will take place, a subsequent determination to resell may be handled by an amendment to the acquiring company's registration statement.²⁵⁹ In that situation, the Commission requires the amendment to contain information about the selling affiliate, "[i]nformation with respect to the consummation of the transaction pursuant to which the" Rule 145 affiliate acquired the Rule 145 stock and any material changes in the acquiring company's situation.²⁶⁰

255. See *supra* notes 246-47 and accompanying text.

256. See Form S-4 Registration Statement Under the Securities Act of 1933, General Instructions A.1(4), 2 Fed. Sec. L. Rep. (CCH) ¶ 7162, at 6261.

257. See Form S-4 Registration Statement Under the Securities Act of 1933, Item 7, 2 Fed. Sec. L. Rep. (CCH) ¶ 7163, at 6266.

258. Section 5 of the 1933 Act, 15 U.S.C. § 77e (1982), would apply to such sales, since the affiliate would be considered an "issuer" within section 2(11) of the 1933 Act. 15 U.S.C. § 77b(11) (1982).

259. See Form S-4 Registration Statement Under the Securities Act of 1933, Item 7, 2 Fed. Sec. L. Rep. (CCH) ¶ 7163, at 6266.

260. See *id.* Item 7 requires that the information be furnished "in the prospectus, at

Another alternative for a Rule 145 affiliate is to resell privately.²⁶¹ The theory here is that if a Rule 145 affiliate resells privately, he would not be an underwriter within section 2(11), since his stock was not "purchased from an issuer with a view to . . . distribution" ²⁶² Although the Rule 145 affiliate clearly purchased his securities from the issuer,²⁶³ the absence of a public resale on his part means there is no "distribution"²⁶⁴ of the securities. As a result, the selling Rule 145 affiliate does not fit the definition of an underwriter under section 2(11), and the resales are exempt under section 4(1).

This analysis is consistent with Rule 145(c), which defines an underwriter as a Rule 145 affiliate "who *publicly* offers or sells securities of the issuer" ²⁶⁵ If the resale by the Rule 145 affiliate is not "public," he falls outside the definition of underwriter in Rule 145(c) and thus retains a section 4(1) exemption for such resales.²⁶⁶

The criteria to determine whether resales are public have been the subject of some disagreement among commentators. At least one group of commentators concluded that "only the manner of sale and the number of purchasers are relevant" to the question of whether resales are public.²⁶⁷ Logic dictates that in order to avoid public resales, the criteria established for the section 4(2) private placement exemption²⁶⁸ for issuers must be followed by the reselling shareholders.²⁶⁹ This means that there may be no public advertising of the resales, all offerees and pur-

the time it is being used for the reoffer of the securities to the extent it is not already furnished therein"

261. In Stahl, Sidney, SEC No-Action Letter (Apr. 23, 1981) (LEXIS, Fedsec library, NoAct file), the staff expressly recognized that Rule 145 affiliates could resell privately without the need to comply with the registration provisions of the 1933 Act.

262. 15 U.S.C. § 77b(11) (1982).

263. See 17 C.F.R. § 230.145(a) (1987); see also *supra* note 242 and accompanying text.

264. "Distribution" and "public offering" (or "public sale") are generally considered synonymous. See Wheat Report, *supra* note 231, at 161-62; 1 L. Loss, *supra* note 3, at 551; Orrick, *supra* note 231, at 350.

265. 17 C.F.R. § 230.145(c) (1987) (emphasis added). For the text of Rule 145(c), see *supra* note 1.

266. Section 4(1) of the 1933 Act provides an exemption from registration for offers and sales by all persons other than an "issuer, underwriter, or dealer." 15 U.S.C. § 77d(1) (1982).

267. *The Section "4(1-1/2)" Phenomenon: Private Resales of "Restricted" Securities*, 34 Bus. Law. 1961, 1976 (1979) [hereinafter *The Section 4(1-1/2) Phenomenon*].

268. Section 4(2) of the 1933 Act exempts from the registration requirements "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(2) (1982). It is generally thought that Section 4(2) requires that offerees and purchasers must be able to evaluate the merits and risks of the investment and must have access to or be supplied with the same information that would be contained in a registration statement. See, e.g., Schwartz, *Private Offering Exemption: Recent Developments*, 37 Ohio St. L.J. 1, 17 (1976).

269. For an example of a case indicating that private resales must be made under conditions similar to those required for a Section 4(2) exemption, see *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 466-67 (2d. Cir. 1959). After reviewing the cases dealing with private resales, one set of commentators stated that "[t]he Purchasers' sophistication and access

chasers must be sophisticated investors—that is, able to evaluate the merits and risks of the investment—and the purchasers must have access to, or be supplied with, the same information that would be contained in a registration statement.²⁷⁰

These criteria, quite obviously, limit significantly the availability of the private resale for Rule 145 affiliates. For example, resales may not be executed in the market through a broker, since such transactions involve public offers of the securities,²⁷¹ and one, therefore, cannot ensure that all offerees are sophisticated and have access to information. In addition, the requirement that information be available to the purchasers of the Rule 145 affiliate's stock usually involves substantial expense and necessitates cooperation from the issuer, which is the only source of much of that information. Finally, the requirement that the purchaser be sophisticated obviously and dramatically limits the market for the resale of the Rule 145 affiliate's stock.

Rule 145 affiliates may also use Rule 145(d) to resell registered Rule 145 stock. Pursuant to subsection (1) of Rule 145(d),²⁷² a Rule 145 affiliate may resell immediately—that is, without any holding period²⁷³—if

to information appear to have been viewed as essential in five of the six decisions [reviewed].” *The Section 4(1-1/2) Phenomenon*, *supra* note 267, at 1971.

270. See 15 U.S.C. § 77d(2) (1982). One author summarized his conclusions about private resales as follows:

1. *The Purchaser*—The purchaser must be financially responsible and therefore able to bear the economic risks of his purchase if that investment proves unsatisfactory. The purchaser must also be a “sophisticated investor” capable of discerning the merits and risks of his investment. . . .

2. *Information Regarding the Issuer*—The purchaser must be given all the relevant information (i.e., that which would be contained in a registration statement) regarding the issuer . . . or at least given access to this information. . . .

3. *Manner of Sale*—[A] seller relying on this exemption cannot publicly solicit purchasers through brokers or by means of advertisements offering circulars and the like. . . .

4. *Acquisition for Investment*—[T]he purchaser in a private sale must agree to acquire his shares for investment and not with a view to resell or distribute them.

D. Goldwasser, *The Practitioner's Comprehensive Guide to Rule 144*, at 390-91 (1975).

Another group of authors summarized their conclusions about private resales as follows:

1. The appropriate exemptive provision is section 4(1) and not 4(2).
2. No particular holding period is required.
3. The Purchasers' sophistication and access to information appear to have been viewed as essential in five of the six decisions.
4. The number of purchasers, viewed alone, is not dispositive of the availability of an exemption.
5. Restrictions on resales by a purchaser generally have not been required.
6. No decision has articulated an affirmative duty on a Holder to provide registration-type information to a Purchaser.

The Section 4(1-1/2) Phenomenon, *supra* note 267, at 1970-71.

271. See *supra* note 242 and accompanying text.

272. 17 C.F.R. § 230.145(d)(1) (1987). For the text of Rule 145(d)(1) see *supra* note 1.

273. Rule 144 places certain holding period requirements on sellers of restricted securities. See 17 C.F.R. § 230.144(d) (1987).

the acquiring company meets the current public information requirement of Rule 144(c),²⁷⁴ if the resales are effected in brokers' transactions, as defined by Rule 144,²⁷⁵ and if the resales do not during each three-month period exceed one-percent of the total outstanding shares of the issuer (that is, the acquiring company).²⁷⁶ In addition, Rule 145(d)(2) permits unlimited resales after a two-year holding period,²⁷⁷ provided only that the issuer meets the current public information requirement of Rule 144(d).²⁷⁸ After a three-year holding period, Rule 145(d)(3) permits Rule 145 affiliates to resell with no restrictions.²⁷⁹

Rule 145(d) provides workable provisions if a large, publicly traded company acquires a substantially smaller company in a registered Rule 145 transaction. In such instances the affiliates of the acquired company are able to meet the resale requirements of Rule 145(d)(1). Furthermore, because the quantity limitations of Rule 145(d)(1) are a function of the outstanding stock of the acquiring company, which is assumed to be much larger than the acquired company, Rule 145 affiliates may be able to sell all their Rule 145 stock immediately within the one-percent limitation.²⁸⁰

274. 17 C.F.R. § 230.144(c) (1987). Under Rule 144, an issuer can meet the current public information requirement either by having filed all reports required under the 1934 Act, if the issuer is reporting either under Section 13 or Section 15(d) or the 1934 Act, or by causing such information to become "publicly available." *Id.*

275. 17 C.F.R. §§ 230.144(f), (g) (1987). To meet the brokers' transaction requirement, the sales must, as a practical matter, be made in the market without any solicitation on the part of the selling broker. *See id.*

276. *See* 17 C.F.R. § 230.144(e)(1) (1987). Rule 145(d)(1), 17 C.F.R. § 230.145(d)(1) (1987), incorporates by reference the amount limitations of Rule 144(e), 17 C.F.R. § 230.144(e) (1987), which allow the sale within any three-month period of up to the greater of one percent of the outstanding stock of the issuer, or the weekly trading volume of such securities.

277. *See* 17 C.F.R. § 230.145(d)(2) (1987). For the text of Rule 145 *see supra* note 1. This provision is not available to a shareholder who is an affiliate of the acquiring company.

In determining whether one meets the holding period requirements of Rule 145(d)(2) and (3), the staff, in one no-action response, concluded that one cannot tack the time that one held the securities of the acquired company. *See* First NH Banks, SEC No-Action Letter (available Jan. 23, 1987) (LEXIS, Fedsec library, NoAct file). The staff reached a contrary result, however, in Saver's Bancorp, SEC No-Action Letter (available Feb. 4, 1985) (LEXIS, Fedsec library, NoAct file). These two responses involve two nearly identical letters issued on the same day involving two separate acquisitions by the same bank.

278. 17 C.F.R. § 230.145(d)(2) (1987). For the text of Rule 145 *see supra* note 1.

279. *See* 17 C.F.R. § 230.145(d)(3) (1987). For the text of Rule 145 *see supra* note 1. This provision is not available to a shareholder who is an affiliate of the acquiring company.

280. *See supra* note 276. For example, assume Alpha Co., which has 1,000 shares of common stock outstanding, valued at \$100 per share, is acquired in a statutory merger by Beta Co., and that after the acquisition, Beta Co. has 100,000 shares of common stock outstanding valued at \$100 per share. Each share of Alpha is exchanged for one share of Beta. Immediately after the merger, Mr. Adams, who was the CEO of Alpha and owned 60% (600 shares) of the Alpha stock may, within the quantity limitations of Rule 145(d)(1), immediately resell all his Beta stock, since his 600 shares of Beta stock represent less than one percent of all outstanding Beta stock.

Frequently, however, Rule 145(d) may be unavailable to meet the resale needs of Rule 145 affiliates. For example, if the acquiring company is not actively traded, Rule 145(d)(1) is unavailable, since the resales cannot be effected in brokers' transactions, as required by Rule 145(d)(1) and Rule 144(f) and (g).²⁸¹ If a Rule 145 affiliate holds such stock for two years, his ability to use Rule 145(d)(2) for resales may still be problematic, since it may be difficult to meet the current public information requirement of Rule 145(d)(2) and Rule 144(c).²⁸²

Therefore, Rule 145(d) may not provide workable resale provisions, especially when small, untraded companies are involved in Rule 145 transactions. In such instances, the easiest solution, at least from the Rule 145 affiliate's point of view, is a contractual agreement with the acquiring company that it will register the resales upon request, either by amendment to the existing registration statement or by filing a new registration statement if necessary. Otherwise, the Rule 145 affiliate is limited to a private resale or, after holding the stock for at least two or three years, to resales under Rule 145(d)(2) or (3), neither of which may be satisfactory.

D. *Resales of Rule 145 Stock Acquired Pursuant to Section 3(a)(9),
Section 3(a)(10) or Regulation A*

As discussed above,²⁸³ Rule 145 transactions sometimes are structured to qualify for exemptions from the registration requirements of the 1933 Act ("exempt Rule 145 transactions"). Unfortunately, resales of stock received in exempt Rule 145 transactions ("exempt Rule 145 stock") often involve complex and confusing problems for the issuer and the selling shareholder.

The Commission takes the position that Rule 145 stock acquired pursuant to certain exemptions is freely tradable unless the stock is held by

281. See 17 C.F.R. § 230.144(f), (g); 17 C.F.R. § 145(d)(1) (1987). For the text of Rule 145 see *supra* note 1. For a discussion of the inability of shareholders in small corporations to meet the brokers' transaction requirement, see Campbell, *The Plight of Small Issuers (and Others) Under Regulation D: Those Nagging Problems that Need Attention*, 74 Ky. L.J. 127, 157 (1985-86).

282. The Commission has indicated that nonreporting companies may meet the "publicly available" requirement by supplying information to shareholders, recognized financial services and interested dealers and market makers. See Division of Corporation Finance's Interpretations of Rule 144, Securities Act Release No. 5306, Part VI B, Illustration 1, 1 Fed. Sec. L. Rep. (CCH) ¶ 2705F, at 2815 (Sept. 26, 1972). With regard to whether the foregoing is the only method by which nonreporting companies can insure that information is "publicly available," compare Miller & Seltzer, *The SEC's New Rule 144*, 27 Bus. Law. 1047, 1054 (1972) ("it seems safe to conclude that sending such information periodically to the issuer's stockholders will suffice") with Rissman, *Rule 144: Manner of Sale and Availability of Public Information*, 67 Nw. U.L. Rev. 124, 134 (Supp. 1972) ("unless those guidelines can be fully complied with, it would seem advisable for a broker handling a transaction under Rule 144(c)(2) to obtain interpretation from the SEC staff before proceeding with the sale").

283. See *supra* notes 144-64 and accompanying text.

an affiliate of the acquired or acquiring company²⁸⁴ or unless the transaction is subject to the Commission's "one-percent rule."²⁸⁵ The Commission's position on this matter, however, is apparently limited to the resale of Rule 145 stock acquired under section 3(a)(9), which is the exemption for certain single company recapitalizations,²⁸⁶ section 3(a)(10), which is the exemption for transactions affirmed as to fairness by governmental authorities,²⁸⁷ and Regulation A, which is the exemption for small offerings, best described as a short-form registration.²⁸⁸ Accordingly, nonaffiliates (except as modified by the one-percent rule) holding such exempt securities may resell those securities without concern about registration, holding periods, limitations on the amount of such sales, or on the types of sales that may be effected, or similar restrictions.²⁸⁹ Such resales are exempt under section 4(1) because the selling shareholder is

284. See CommerceAmerica Corp., SEC No-Action Letter (available Dec. 16, 1985) (LEXIS, Fedsec library, NoAct file) (§ 3(a)(9) exemption); Federated Guar. Life Ins. Co., SEC No-Action Letter (available Apr. 21, 1983) (LEXIS, Fedsec library, NoAct file) (§ 3(a)(10) exemption); Western Gulf Fin. Corp., SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file) (§ 3(a)(10) exemption). Research for this Article revealed no no-action letter involving resales of Rule 145 stock originally issued in a Regulation A offering. In a release, however, the Commission stated that, although the language of Rule 145(d) suggests that it would be inapplicable, Rule 145 affiliates holding Rule 145 stock issued pursuant to Regulation A, section 3(a)(9) or section 3(a)(10) in fact could utilize Rule 145(d) for its resales. See Resale of Restricted and Other Securities, Interpretations of Rules, Release No. 33-6099, Part III, Question 87, 1 Fed. Sec. L. Rep. (CCH) ¶ 2705H, at 2819-27 (Aug., 1979). This indicates that securities purchased under any of those three exemptions may be resold pursuant to similar rules.

285. For a discussion of the Commission's one-percent rule, see *infra* notes 307-13 and accompanying text.

286. 15 U.S.C. § 77c(a)(9) (1982). Section 3(a)(9) of the 1933 Act provides an exemption from registration for "any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange." *Id.*

287. 15 U.S.C. § 77c(a)(10) (1982). Section 3(a)(10) of the 1933 Act provides an exemption from registration for

any security which is issued in exchange for one or more bona fide outstanding securities . . . where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.

Id.

288. 15 U.S.C. § 77c(b) (1982). Section 3(b) of the 1933 Act allows the Commission by rule to exempt any class of securities "if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest . . ." *Id.* The amount that can be exempted is limited to \$5 million. See *id.* Pursuant to this authority, the Commission enacted Regulation A, 17 C.F.R. § 230.251 to .264 (1987), which allows public offerings of up to \$1.5 million via the filing of information with the Commission and the disclosure of information to offerees and purchasers.

289. See *supra* notes 272-79 and accompanying text for a discussion of the various restrictions.

not considered an issuer, underwriter or dealer.²⁹⁰ This is, of course, the same resale privilege allowed nonaffiliates who acquire registered Rule 145 stock.²⁹¹

An affiliate of the acquired company, however, is subject to restrictions with respect to the resale of exempt Rule 145 stock received pursuant to section 3(a)(9), section 3(a)(10) or Regulation A.²⁹² Specifically, Rule 145(c) provides that such a Rule 145 affiliate becomes an underwriter if he "publicly offers or sells" the securities.²⁹³ As a result, section 4(1), which exempts sales by persons other than issuers, underwriters and dealers, is unavailable for such resales, and affiliates, therefore, must either register the resales or qualify for another exemption.

If a Rule 145 affiliate holds stock received in a Rule 145 transaction exempt under section 3(a)(9), section 3(a)(10) or Regulation A, his resale alternatives are, at least theoretically, the same as a Rule 145 affiliate holding registered Rule 145 stock.²⁹⁴ Practically, however, the situations are different.

First, of course, registration is a possibility for a Rule 145 affiliate wishing to resell such exempt Rule 145 stock. Realistically, this is an improbable solution due to the costs and difficulty of registering such a resale. Unlike a registered Rule 145 transaction, there is, with respect to exempt Rule 145 stock, no existing registration statement that can be used to effect such resales. In addition, if the issuer of the exempt Rule 145 stock is not a reporting company under the 1934 Act, the information may be inaccessible, and the experience necessary to facilitate registration may be lacking. The cost of registering the resales would,

290. It is difficult to find a direct statement from the Commission affirming that section 4(1) is the basis for the permissibility of such resales. In a number of no-action requests, however, the requests proffered that section 4(1) is the basis for such resales, and the Commission, without commenting on the analysis, affirmed the right to resale. *See, e.g.*, Western Gulf Fin. Corp., SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file); Bell Canada, SEC No-Action Letter (available Aug. 2, 1982) (LEXIS, Fedsec library, NoAct file).

291. *See supra* notes 239-82 and accompanying text.

292. *See, e.g.*, First NH Banks, SEC No-Action Letter (available Jan. 23, 1987) (LEXIS, Fedsec library, NoAct file); CommerceAmerica Corp., SEC No-Action Letter (available Dec. 16, 1985) (LEXIS, Fedsec library, NoAct file); Arizona Silver Corp., SEC No-Action Letter (available July 26, 1985) (LEXIS, Fedsec library, NoAct file); Methus Dev. Partners, SEC No-Action Letter (available Mar. 27, 1985) (LEXIS, Fedsec library, NoAct file); Saver's Bancorp, SEC No-Action Letter (available Feb. 4, 1985) (LEXIS, Fedsec library, NoAct file).

293. *See* 17 C.F.R. § 230.145(c) (1987). For the text of Rule 145 *see supra* note 1.

294. Theoretically, affiliates holding registered Rule 145 stock and affiliates holding exempt Rule 145 stock have purchased securities from an issuer. If, therefore, the affiliates of the exempt Rule 145 stock make a "distribution" of the stock, they would appear to meet the definition of an underwriter within § 2(11), 15 U.S.C. § 77b(11) (1982), just as affiliates with registered Rule 145 stock would meet the definition. *See supra* notes 240-43 and accompanying text. Accordingly, both affiliates holding registered Rule 145 stock and affiliates holding exempt Rule 145 stock must either register the resales or structure the sales in ways that are outside the definition of "underwriter," enabling them to retain the Section 4(1) exemption.

therefore, be significant and would eliminate the savings recognized by the original exemption for the Rule 145 transaction.

Rule 145 affiliates holding stock acquired pursuant to section 3(a)(9), section 3(a)(10) or Regulation A also may resell under section (d) of Rule 145.²⁹⁵ Although that section appears on its face to be limited to resales of "registered securities,"²⁹⁶ the Commission takes the position that Rule 145(d) is available for resales of such exempt Rule 145 stock.²⁹⁷

The availability of Rule 145(d) for resales of such exempt Rule 145 stock, however, is subject to the same practical limitations discussed earlier with regard to resales of registered Rule 145 stock.²⁹⁸ If the issuer (the acquiring company) is reporting under the 1934 Act and is traded in an organized market, Rule 145(d) provides a workable framework for immediate resales, within the amount limitations of Rule 144,²⁹⁹ and unlimited resales after a two-year holding period.³⁰⁰ If, on the other hand, the issuer (the acquiring company) is not reporting under the 1934 Act and not traded actively, Rule 145(d) may, for the reason previously described, effectively require a three-year holding period.³⁰¹

In any event, the Commission does not allow tacking in computing the holding period for Rule 145(d).³⁰² Accordingly, the holding period for a Rule 145 affiliate under Rule 145(d)(2) or (3) runs from the Rule 145 transaction and not from the time the Rule 145 affiliate acquired the stock in the acquired company.³⁰³

A private resale is another alternative for an affiliate holding Rule 145

295. 17 C.F.R. § 230.145(d) (1987) (resale provisions for persons deemed underwriters under Rule 145).

296. 17 C.F.R. § 230.145(d) (1987). Rule 145(d) states that an affiliate shall not be considered "an underwriter of registered securities" if the conditions of the rule are met. *Id.* For the text of Rule 145 see note 1, *supra*.

297. See Resale of Restricted and Other Securities, Interpretations of Rules, Release No. 33-6099, Part III, Question 87, 1 Fed. Sec. L. Rep. (CCH) ¶ 2705H, at 2819-27 (Aug. 2, 1979); First NH Banks, SEC No-Action Letter (available Jan. 23, 1987) (LEXIS, Fedsec library, NoAct file); Hadson Petroleum Corp., SEC No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); Metheus Dev. Partners, SEC No-Action Letter (available Mar. 27, 1985) (LEXIS, Fedsec library, NoAct file); Saver's Bancorp, SEC No-Action Letter (available Feb. 28, 1985) (LEXIS, Fedsec library, NoAct file); Old Stone Corp., SEC No-Action Letter (available Dec. 19, 1984) (LEXIS, Fedsec library, NoAct file); Western Gulf Fin. Corp., SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file).

298. See *supra* notes 272-82 and accompanying text.

299. See *supra* notes 273, 275 and accompanying text.

300. See *supra* notes 273-79 and accompanying text.

301. See *supra* notes 281-82 and accompanying discussion.

302. See *supra* note 277.

303. See, e.g., Bank of New Hampshire, SEC No-Action Letter (available June 12, 1987) (LEXIS, Fedsec library, NoAct file); First NH Banks, SEC No-Action Letter (available Jan. 23, 1987) (LEXIS, Fedsec library, NoAct file); Convergent Technologies, Inc., SEC No-Action Letter (available Dec. 29, 1986) (LEXIS, Fedsec library, NoAct file).

In computing the applicability of Rule 145(d)(3) to resales of Rule 145 stock by a bank, the Commission allowed a bank that was the pledgee of Rule 145 stock to tack its pledgor's holding period from the date of the Rule 145 transaction, but not the pledgor's

stock acquired pursuant to section 3(a)(9), section 3(a)(10) or Regulation A.³⁰⁴ The requirements imposed on such resales,³⁰⁵ however, may be burdensome.

The most apparent difficulty in such resales is meeting the disclosure requirements, as it may be expensive and time consuming to gather and disclose the same information that would be contained in a registration statement. Especially in instances where the issuer is not a reporting company under the 1934 Act, which often may be the case in exempt Rule 145 transactions, the company may not have the annual reports, proxy statements, 10-K's³⁰⁶ and other documents that can be accessible sources for such disclosures. From an issuer's point of view, therefore, the cost of preparing such disclosures may destroy all the cost savings resulting from initially avoiding registration and may move the total costs of the transaction into an unacceptable range.

Superimposed upon this entire analysis is the Commission's one-percent rule, which essentially provides that shareholders ("one-percent shareholders") who, pursuant to certain exempt Rule 145 transactions,³⁰⁷ receive more than one-percent of the issuer's outstanding stock may resell such securities only³⁰⁸ by meeting the requirements of sections (c), (e), (f) and (g) of Rule 144.³⁰⁹ This limitation on resales applies even though the one-percent shareholder is an affiliate of neither the acquired company nor the acquiring company³¹⁰ and thus not an underwriter within the meaning of Rule 145(c).³¹¹

The Commission, however, will not apply the constraints of the one-

holding period prior to the Rule 145 transaction. See *Kapok Corp.*, SEC No-Action Letter (available Jan. 23, 1987) (LEXIS, Fedsec library, NoAct file).

304. The Commission specifically recognized the availability of private resales in *Stahl, Sidney*, SEC No-Action Letter (available Apr. 23, 1981) (LEXIS, Fedsec library, NoAct file).

305. See *supra* notes 267-70 and accompanying text.

306. See 17 C.F.R. § 249.310 (1987). Form 10-K is the annual report filed with the SEC by 1934 Act reporting companies.

307. See *infra* notes 314-17, 340 and accompanying text.

308. Notwithstanding any indications by the Commission to the contrary, it is clear that there are other resale options available to such shareholders. See *infra* discussion at notes 322-28.

309. See, e.g., *Hadson Petroleum Corp.*, SEC No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); *Western Gulf Fin. Corp.*, SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file); *Spencer R. Collins Charitable Trusts*, SEC No-Action Letter (available July 5, 1982) (LEXIS, Fedsec library, NoAct file).

Section (c) requires adequate currently available public information, see 17 C.F.R. § 230.144(c) (1987), section (e) places limits on the amount of securities that may be sold, see *id.* at § 230.144(e), section (f) describes the manner in which a sale may be made, see *id.* at § 230.144(f), and section (g) delineates the types of resale transactions that are permissible as brokers' transactions covered in § 4(4) of the Act, 15 U.S.C. § 77d(4) (1982); see 17 C.F.R. § 230.144(g) (1987).

310. See, e.g., *Western Gulf Fin. Corp.*, SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file); *Bell Canada*, SEC No-Action Letter (available Aug. 2, 1982) (LEXIS, Fedsec library, NoAct file).

311. See 17 C.F.R. § 230.145(c) (1987).

percent rule if all of the following three conditions are met: (1) the Rule 145 transaction was exempt from registration pursuant to section 3(a)(10), (2) in the course of the Rule 145 transaction, disclosures comparable to those required by the proxy rules of section 14 of the 1934 Act were made to shareholders of the acquired company, and (3) the issuer (the acquiring company) is subject to the 1934 Act's reporting requirements.³¹²

The one-percent rule apparently is based on the theory that these one-percent shareholders who resell their Rule 145 stock are underwriters within the meaning of section 2(11) of the 1933 Act³¹³ and thus must find an exemption for their proposed resales. The one-percent rule, therefore, represents an attempt by the Commission to control the methods of resale used by shareholders holding substantial amounts of Rule 145 stock.

Although one may have a certain sympathy for the predicament of the Commission in dealing with this problem, the uncertainty in the rule's application is troubling. For example, while it is clear that the one-percent rule applies to resales of Rule 145 stock acquired pursuant to section 3(a)(10),³¹⁴ research for this Article uncovered no examples of an application of the one-percent rule to resales of Rule 145 stock acquired pursuant to Regulation A or section 3(a)(9).³¹⁵ Because, however, the Commission generally treats section 3(a)(9), section 3(a)(10) and Regulation A similarly for Rule 145 purposes,³¹⁶ it is likely that the Commission would apply both the one-percent rule and the exception to the one-percent rule to resales of Rule 145 stock acquired under any of these three exemptions.³¹⁷

In addition, it is not entirely clear how one measures the normative one-percent. Is it, for example, one-percent of the total of all outstanding securities, one-percent of the total outstanding shares of the class of secur-

312. See, e.g., Hadson Petroleum Corp., SEC No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); Pegasus Gold, Ltd., SEC No-Action Letter (available Aug. 20, 1984) (LEXIS, Fedsec library, NoAct file); Bell Canada, SEC No-Action Letter (available Aug. 2, 1982) (LEXIS, Fedsec library, NoAct file); Spencer R. Collins Charitable Trusts, SEC No-Action Letter (available July 5, 1982) (LEXIS, Fedsec library, NoAct file); HRS Indus., SEC No-Action Letter (available Apr. 1, 1982) (LEXIS, Fedsec library, NoAct file); Stampede Int'l Resources, Northwest Ventures, SEC No-Action Letter (available Jan. 4, 1982) (LEXIS, Fedsec library, NoAct file).

313. See, e.g., Pegasus Gold Ltd., SEC No-Action Letter (available Aug. 20, 1984) (LEXIS, Fedsec library, NoAct file) (Inquiry-1); International Plasma Corp., SEC No-Action Letter (available Aug. 30, 1974) (LEXIS, Fedsec library, NoAct file).

314. See the no-action letters cited *supra* note 309.

315. Research for this Article uncovered no examples of the Commission's application of the one-percent rule to resales of registered securities, although it appears that some counsel assume—or at least fear—its applicability. See *supra* notes 248, 254.

316. See *supra* notes 284-91 and accompanying text.

317. The one-percent rule appears to have no application to resales of Rule 145 stock acquired pursuant to Regulation D or Section 4(2). For a discussion of the resale restrictions applicable to such stock, see *infra* discussion accompanying notes 345-61. Similarly, research for this Article uncovered no application of the one-percent rule to the resale of Rule 145 stock acquired pursuant to the section 3(a)(11) intrastate exemption and Rule 147. See *infra* discussion accompanying note 341.

ities issued in the Rule 145 transaction, or one-percent of the shares issued in the Rule 145 transaction? Although language in certain no-action letters suggests that the Commission sometimes uses the third alternative,³¹⁸ it appears that the Commission generally uses the second alternative to calculate the one-percent.³¹⁹ That alternative has the advantage of avoiding the computational problems of the first alternative³²⁰ and the unnecessary restrictiveness of the third alternative.³²¹

Finally, if a security holder is caught by the one-percent rule, it is not entirely clear what resale provisions are available. Although the Commission's no-action letters indicate that resales by such one-percent shareholders may be made pursuant to the same requirements as Rule 145(d)(1),³²² research for this Article failed to uncover any no-action letters permitting resales pursuant to Rule 145(d)(2),³²³ which allows resales after a two-year holding period if the issuer meets the current public information requirement of Rule 144,³²⁴ or permitting resale pursuant to Rule 145(d)(3), which allows resales after a three-year holding period.³²⁵ Logic and consistency, however, dictate the availability of these resale provisions for persons caught by the one-percent rule. The one-percent rule, like Rule 145(c), is an attempt by the Commission to identify per-

318. See, e.g., Bank of Highland, SEC No-Action Letter (available Oct. 8, 1984) (LEXIS, Fedsec library, NoAct file) (one-percent of the holding company stock "issued in the exchange"); Mutual Trust Bank, SEC No-Action Letter (available Aug. 20, 1984) (LEXIS, Fedsec library, NoAct file) (one-percent "issued in the exchange"). In each of the foregoing examples, however, it appears that one-percent of the issue was the same as one-percent of the total outstanding stock.

319. See, e.g., Hadson Petroleum Corp., SEC No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); Stampede Int'l Resources, SEC No-Action Letter (available Jan. 4, 1983) (LEXIS, Fedsec library, NoAct file); Western Gulf Fin. Corp., SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file); Spencer R. Collins Charitable Trusts, SEC No-Action Letter (available July 5, 1982) (LEXIS, Fedsec library, NoAct file).

320. For example, how would one compute the total outstanding securities when the issuer has more than one class of securities?

321. If the norm used were the third alternative, one-percent of the shares issued in the Rule 145 transaction, the norm would be especially restrictive when, for example, a large issuer with 10,000,000 common shares outstanding issued 10,000 common shares in a Rule 145 transaction. It would seem unwarranted to impose any resale restrictions, since the stock involved would represent such a small part of the total outstanding shares of the issuer.

322. The no-action letters require that the selling shareholder meet the provisions of subsections (c), (e), (f) and (g) of Rule 144, which are incorporated into Rule 145(d)(1), 17 C.F.R. § 230.145(d)(1) (1987). See, e.g., Hadson Petroleum Corp., SEC No-Action Letter (available Feb. 10, 1986) (LEXIS, Fedsec library, NoAct file); Bank of Highland, SEC No-Action Letter (available Oct. 8, 1984) (LEXIS, Fedsec library, NoAct file); Mutual Trust Bank, SEC No-Action Letter (available Aug. 20, 1984) (LEXIS, Fedsec library, NoAct file); Pegasus Gold, Ltd., SEC No-Action Letter (available Aug. 20, 1984) (LEXIS, Fedsec library, NoAct file); Western Gulf Fin. Corp., SEC No-Action Letter (available Aug. 26, 1982) (LEXIS, Fedsec library, NoAct file); HRS Indus., SEC No-Action Letter (available Apr. 1, 1982) (LEXIS, Fedsec library, NoAct file).

323. 17 C.F.R. § 230.145(d)(2) (1987).

324. See 17 C.F.R. § 230.144(c) (1987).

325. See 17 C.F.R. § 230.145(d)(3) (1987). For the text of Rule 145 see *supra* note 1.

sons holding Rule 145 stock who may make resales of such significant size as to be troublesome. Both, also, are based on the concept that public resales cause the selling shareholders to become underwriters. It, therefore, would be anomalous, both conceptually and practically, to deny the one-percent shareholders access to the same Rule 145(d) resale provisions permitted the Rule 145 affiliate.

Private resales³²⁶ also should be available to the one-percent shareholders. As stated earlier, the conceptual basis for the one-percent rule is the underwriter status of persons who publicly resell exempt Rule 145 stock.³²⁷ If, therefore, a security holder subject to the one-percent rule resells privately, he cannot be considered an underwriter, since he would not be engaging in a distribution.³²⁸ As a result, such resales by the one-percent shareholder would be exempt under the provisions of section 4(1) of the 1933 Act.

In addition to its vagueness, the one-percent rule amounts to administrative overkill. Rule 145(c) contains its own, unique definition of underwriter, the purpose of which, presumably, is to limit large resales. It therefore, seems unnecessary, unfair and confusing to have a second definition of underwriter, the one-percent rule, designed to effect the same purpose as Rule 145(c). What is needed here is a consistent, fair and clearly promulgated rule defining the limitations on resales of exempt Rule 145 stock.

E. *Resales of Rule 145 Stock Issued Pursuant to the Intrastate Exemption*

When an acquiring company uses Rule 147,³²⁹ the intrastate exemption, as a means to avoid registration of a Rule 145 transaction, resale limitations are complicated by the interplay between the two rules. Essentially, such Rule 145 stock can become doubly restricted, subject to the resale limitations of both Rule 145 and Rule 147.

Rule 147(e)³³⁰ contains resale limitations designed to ensure that stock offered under Rule 147 comes to rest in the hands of local investors who have access to information about the issuer.³³¹ Accordingly, for nine

326. See *supra* notes 261-64 and accompanying text.

327. See *supra* notes 312-13 and accompanying text.

328. See *supra* note 264 and accompanying text.

329. 17 C.F.R. § 230.147 (1987). In addition to Rule 147, it is possible to fall within the intrastate exemption by complying with the common law requirements that have developed under § 3(a)(11) of the 1933 Act. 15 U.S.C. § 77c(a)(11) (1982). These requirements, however, are so uncertain that, as a practical matter, it is nearly impossible to rely on the common law of § 3(a)(11). See Alberg & Lybecker, *New SEC Rules 146 and 147: The Nonpublic and Intrastate Offering Exemptions from Registration for the Sale of Securities*, 74 Colum. L. Rev. 622, 649 (1974); Campbell, *supra* note 150, at 1165-66. As a result, this Author discusses only Rule 147 herein.

330. 17 C.F.R. § 230.147(e) (1987) (all resales must be made to residents within state or territory).

331. The intrastate exemption and Rule 147 appear to be based, at least in part, on the geographic proximity of the issuer and investor, which, it is thought, provides the inves-

months after the completion of an offering under Rule 147, holders may resell only to persons who are residents of the same state as the issuer.³³² Thereafter, Rule 147 imposes no limitation on resales.³³³

The specific resale limitations contained in Rule 147, however, are not the only applicable limitations. Rule 145(c) also contains resale restrictions. Specifically, anyone who is an affiliate of the acquired company becomes an underwriter if that Rule 145 affiliate "publicly offers or sells" Rule 145 stock.³³⁴ Thus, to avoid underwriter status and the loss of the section 4(1) exemption, the Rule 145 affiliate must either make his resales privately³³⁵ or sell pursuant to the terms of Rule 145(d).³³⁶

The position of the Commission is that the resale limitations of both Rule 145(c) and Rule 147 are applicable to the resale of Rule 145 stock acquired in a transaction exempt under Rule 147.³³⁷ Accordingly, for the first nine months following such a transaction, Rule 145 affiliates, in order to comply with the resale restrictions of Rule 147(e), are limited to intrastate sales only and in order to avoid the restrictions imposed by Rule 145(c), must sell either privately or pursuant to Rule 145(d). Nonaffiliates holding such stock may sell during that nine-month period only to persons resident in the same state as the acquiring company, because such resales are subject to the resale limitations of Rule 147(e). Such nonaffiliates, however, are not subject to the resale restrictions of Rule 145 because they are not underwriters under Rule 145(c).³³⁸ After the nine-month period, the limitations of Rule 147(e) expire. Accord-

tor with access to information about the issuer, thus relieving the need to mandate disclosure. Along these lines, one commentator has stated:

The following reasons have been offered from time to time in support of the intrastate exemption: (1) In terms of economic policy, it is useful to allow securities offerings by a small businessman to his friends, relatives, business associates, and others, without federal restrictions; (2) registration for such small offerings would, as a practical matter, be almost impossible; (3) investors in local financings are protected by the sanctions of public opinion; (4) such investors are protected by their proximity to the issuer; (5) such investors are protected by state regulation; and (6) intrastate offerings do not present questions of national interest.

Hicks, *Intrastate Offering Under Rule 147*, 72 Mich. L. Rev. 463, 499 (1974) (footnotes omitted).

332. Rule 147(e) provides:

During the period in which securities that are part of an issue are being offered and sold by the issuer, and for a period of nine months from the date of the last sale by the issuer of such securities, all resales of any part of the issue, by any person, shall be made only to persons resident within such state or territory.

17 C.F.R. § 230.147(e) (1987).

333. See *id.*

334. 17 C.F.R. § 230.145(c) (1987). For the text of Rule 145(c) see *supra* note 1.

335. See *supra* notes 261-70 and accompanying text.

336. See *supra* notes 272-82 and accompanying text.

337. See, e.g., Hungry Tiger Inc., SEC No-Action Letter (available Aug. 27, 1982) (LEXIS, Fedsec library, NoAct file); United Virginia Bankshares, SEC No-Action Letter (available Feb. 13, 1978) (LEXIS, Fedsec library, NoAct file).

338. See 17 C.F.R. § 230.145(c) (1987) (underwriters defined as those who resell publicly, or who are affiliates).

ingly, stock held by nonaffiliates is freely tradable,³³⁹ while stock held by Rule 145 affiliates continues to be subject to the resale limitations of Rule 145.

In addition, the Commission may impose its one-percent rule³⁴⁰ on resales of Rule 145 stock acquired in transactions exempt under Rule 147. The practical impact of this would be to expand the definition of underwriter to include any shareholder of the acquired company who received one-percent of the Rule 145 stock, if such shareholder publicly resells such Rule 145 stock.³⁴¹ This one-percent rule would apply both during and after the nine-month limitation imposed by Rule 147.³⁴²

Certainly it makes no sense to apply the one-percent rule to such situations. As described earlier, the one-percent rule represents administrative overkill,³⁴³ and its application is even less defensible in a situation where both Rule 145(c) and Rule 147 already limit resales. Nonetheless, research for this Article failed to uncover any no-action letters on the application of the one-percent rule in such resales, and thus there is at least some risk that the Commission would apply it.

Even without the one-percent rule, however, there is no legitimate reason for imposing dual resale restrictions of Rule 145(c) and Rule 147 on the resale of Rule 145 stock acquired in a transaction exempt under Rule 147. Standing alone, the resale provisions of Rule 147 are entirely adequate to ensure that legitimate policy goals of the 1933 Act are met, because Rule 147 requires that the stock comes to rest in the hands of local investors who presumably have access to information about the company.³⁴⁴ The Commission considers this limitation to be appropriate for the Rule 147 exemption in non-Rule 145 situations, and there is no basis for concluding otherwise in a Rule 145 transaction.

F. *Resales of Rule 145 Stock Issued Pursuant to Section 4(2) or Regulation D*

As a conceptual matter, the resale of Rule 145 stock acquired in a

339. Although no no-action letter directly states this proposition, it is clear from Rule 147(e) itself. In one response, however, the Commission did not challenge the statement by the requesting attorney that "non-affiliates . . . following the satisfaction of Rule 147(e) would be able to resell the securities acquired in the merger transaction without restriction." United Virginia Bankshares, SEC No-Action Letter (available Feb. 13, 1978) (LEXIS, Fedsec library, NoAct file).

340. For a discussion of the one-percent rule as applied to resales of other exempt Rule 145 stock, see *supra* notes 307-24 and accompanying text.

341. Although the Commission has never explained the theoretical basis for the one-percent rule, it appears, as described earlier, that it is founded on the notion that persons acquiring one-percent of the Rule 145 stock become underwriters if they resell publicly. See *supra* discussion accompanying notes 312-14.

342. This is because one's status as an "underwriter" would be unaffected by the nine-month limitation.

343. See *supra* notes 328-29 and accompanying text.

344. See *supra* note 331 and accompanying text.

transaction by the issuer exempt under section 4(2)³⁴⁵ or Regulation D,³⁴⁶ ("restricted securities") is relatively simple. Essentially, resales of restricted securities acquired in a Rule 145 transaction ("restricted Rule 145 stock") are subject only to the provisions governing the resale of restricted securities generally and are not, therefore, subject to any additional limitations on resales imposed by Rule 145(c) or any other administrative interpretation. A bit of analysis, however, is required to reach this result.

Persons holding any restricted securities have three alternatives for resale without registration. First, resales may be made in private transactions, as described earlier in this Article.³⁴⁷ Second, restricted securities may be resold pursuant to Rule 144, if the holder meets all the conditions of that Rule, including the holding period requirement of section (d).³⁴⁸ Finally, it may be possible to effect public resales outside the provisions of Rule 144³⁴⁹ ("common law public resale exemption"). Although the availability of the common law public resale exemption has become somewhat clouded in recent years,³⁵⁰ if the holder establishes that the restricted securities were acquired with the proper investment intent,

345. 15 U.S.C. § 77d(2) (1982) (exempting transactions by an issuer not involving any public offering).

346. 17 C.F.R. §§ 230.501 to .506 (1987).

347. See *supra* notes 261-71 and accompanying text.

348. See 17 C.F.R. § 230.144(d) (1987).

349. See generally 1 L. Loss, *supra* note 3, at 665-73; Volk & Schneider, *The Sale of Restricted Securities Outside of Rule 144*, in Eighth Annual Institute of Securities Regulation 135-48 (1977); Wheat Report, *supra* note 231, at 160-77.

350. This resulted from the Commission's release adopting Rule 144, see Securities Act Release No. 5223, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,487, at 81,049 (Jan. 11, 1972), in which the Commission stated: (1) "the 'change in circumstances' concept should no longer be considered as one of the factors in determining whether a person is an underwriter," *id.* at 81,050-51; (2) "the fact that securities have been held for a particular period of time does not by itself establish the availability of an exemption from registration," *id.* at 81,051; (3) "the staff will not issue no-action letters relating to resales of such [restricted] securities," *id.* at 81,050; and (4) persons making sales of restricted securities outside Rule 144 "will have a substantial burden of proof in establishing that an exemption from registration is available for such offers or sales . . ." *Id.*

The practical impact of this pronouncement was to limit significantly public resales outside Rule 144. See Lipton, Fogelson & Warnken, *Rule 144—A Summary Review After Two Years*, 29 Bus. Law. 1183 (1974), wherein the authors state:

In view of the strong policy statements of the SEC in Release No. 5223 . . . , it would appear that counsel may render favorable opinions as to sales outside the Rule of post-144 restricted securities only in very limited situations—those where the issuer is a major listed company, the amount can be sold readily without material effect on the market . . . and there has been a holding period substantially more than two years (probably in the area of three to five years). Substantially the same standards are applicable to pre-144 restricted securities, except that the current three-year holding period is generally considered adequate. Most lawyers will not give an opinion in either situation where the company is marginal or the amount of securities cannot be readily absorbed by the normal trading market, no matter what the holding period.

Id. at 1198.

public resale of restricted securities is possible.³⁵¹ This, in turn, probably requires a sufficient holding period, perhaps three years,³⁵² or the availability of the change-in-circumstances doctrine.³⁵³

By meeting the requirements of any of these three resale alternatives, a selling shareholder falls outside the definition of underwriter and thus retains the section 4(1) exemption. Specifically, if resales are made privately or pursuant to Rule 144, the resales do not involve a "distribution."³⁵⁴ If resales are made pursuant to the common law public resale exemption, then the person selling the restricted securities, although engaged in a distribution,³⁵⁵ is not considered as having "purchased . . . with a view to . . . distribution"³⁵⁶

These same alternatives are also available to protect persons selling restricted Rule 145 stock. Thus, if an affiliate of the acquired company, who may become an underwriter under Rule 145(c), or a one-percent shareholder, who may become an underwriter under the one-percent rule, sells restricted Rule 145 stock privately or pursuant to Rule 144 or the common law public resale exemption, the selling shareholder does not fall within the definition of underwriter. This first protects the selling shareholder from the requirements of Rule 145(c) and the one-percent rule since the constraint of these rules applies only if the selling shareholders are underwriters, and second ensures the availability of a section 4(1) exemption, since the selling shareholder is not an issuer, underwriter or dealer.

This analysis appears consistent with the small number of Commission interpretations available. Specifically, in a 1979 release, the Commission refused to allow the use of Rule 145(d) for the resales of restricted Rule 145 stock.³⁵⁷ A contrary result would have allowed such resales under

351. By establishing that the restricted securities were acquired for investment, the holder will not be considered as having "purchased . . . with a view to . . . distribution" and thus will fall outside the definition of "underwriter" in § 2(11) of the 1933 Act. 15 U.S.C. § 77b(11) (1982). This, then, insures the availability of the § 4(1) exemption for such resales. See 15 U.S.C. § 77d(1) (1982) (exempting transactions by persons other than issuers, underwriters or dealers). See generally authorities cited *supra* note 350 for a discussion of these matters.

352. See Campbell, *supra* note 281, at 153-55.

353. The basis of the change-in-circumstances doctrine is a change in the selling shareholder's circumstances that reconciles an original investment intent with the subsequent public distribution. Thus, although the selling shareholder "purchased from an issuer" and subsequently made a "distribution," he is considered not to have purchased with a "view to distribution." Instead, he purchased, it is assumed, with an original investment intent (that is, without a "view to distribution"), but changed his intent because of changed circumstances. This keeps the selling shareholder outside the section 2(11) definition of underwriter. See generally Wheat Report, *supra* note 231, at 166-70; T. Hazen, *supra* note 213, at 146-47.

354. 17 C.F.R. § 230.144(b) (1987). With regard to private resales, see *The Section 4(1/2) Phenomenon*, *supra* note 267, at 1961.

355. See Campbell, *supra* note 281, at 151-52.

356. 15 U.S.C. § 77b(11) (1982).

357. Resale of Restricted and Other Securities, Interpretations of Rules, Release No. 33-6099, Part III, Question 87, 1 Fed. Sec. L. Rep. (CCH) ¶ 2705H, at 2819-27 (Aug. 2,

terms more favorable than those generally available for the resale of other restricted securities, since Rule 145(d)(1), unlike Rule 144, imposes no holding period for resales.³⁵⁸ The implication, therefore, is that such restricted Rule 145 stock must be sold under the normal resale provisions available for restricted securities generally.

Consistent with its position in related situations, the Commission has concluded that tacking is not permitted for restricted Rule 145 stock.³⁵⁹ Accordingly, in the *Latoka, Inc. & Itasca, Inc.* no-action letter,³⁶⁰ the Commission stated that the Rule 144(d) holding period for Rule 145 stock acquired under the exemption provided by section 4(2) runs from the date of the Rule 145 transaction, not from the date the shareholder purchased his or her stock in the acquired company.³⁶¹

G. *Resales of Rule 145 Stock Issued in Exchange for Restricted Stock*

In a Rule 145 transaction, part, or all, of the shares of the acquired company may be subject, at the time of the Rule 145 transaction, to resale limitations, such as those imposed by section 4(2),³⁶² Regulation D,³⁶³ Rule 147³⁶⁴ or Rule 145(d).³⁶⁵ The question therefore arises whether such pre-existing limitations on resale apply to the new, Rule 145 stock.

If the Rule 145 transaction is registered, the position of the Commission is that the registration cleanses any existing restrictions on the shares.³⁶⁶ As a result, the Rule 145 stock is freely tradable, subject only

1979). This release appears to reverse a prior position of the Commission. See Ward Foods, SEC No-Action Letter (available Dec. 19, 1977) (LEXIS, Fedsec library, NoAct file).

358. Rule 145(d)(1), 17 C.F.R. § 230.145(d)(1) (1987), does not require compliance with the holding period in Rule 144(d), 17 C.F.R. § 230.144(d) (1987), if sections (c), (e), (f) and (g) of Rule 144, *id.* at § 230.144(c)-(g), pertaining to availability of information about the company, amount of securities sold, and manner of sale, are met.

359. See *supra* note 303 and accompanying text.

360. See *Latoka, Inc. & Itasca, Inc.*, SEC No-Action Letter (available June 15, 1987) (LEXIS, Fedsec library, NoAct file).

361. See *id.*

362. See 15 U.S.C. § 77d(2) (1982). For a discussion of these limitations, see Campbell, *supra* note 281, at 147-62.

363. See 17 C.F.R. § 230.502(d) (1987) (securities acquired under Regulation D have the same status as those acquired under section 4(2)).

364. See 17 C.F.R. § 230.147(e) (1987) (during the offering, and for nine months from the last sale, all resales may be made only to residents within the state).

365. See 17 C.F.R. § 230.145(d) (incorporating the resale limitations of Rule 144(c)-(g), 17 C.F.R. § 230.144(c)-(g) (1987)). Although the no-action responses cited in this section involve pre-existing resale limitations imposed by § 4(2), see *supra* note 362, and by Rule 145(c), 17 C.F.R. § 230.145(c) (1987), logic and consistency indicate that a similar response would be appropriate in instances where the pre-existing resale limitation is imposed by any other section or rule under the 1933 Act: including § 3(a)(11), 15 U.S.C. § 77c(a)(11) (1982); Rule 147, 17 C.F.R. § 230.147 (1987); and Regulation D, 17 C.F.R. §§ 230.501 to .506 (1987), or § 4(6), 15 U.S.C. § 77d(6) (1982).

366. See, e.g., Kaneb Serv., SEC No-Action Letter (available Mar. 9, 1981) (LEXIS, Fedsec library, NoAct file) (securities restricted pursuant to Rule 145(c)); Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act

to the limitations in Rule 145(d) discussed earlier in the Article.³⁶⁷

If, on the other hand, the Rule 145 transaction qualifies for an exemption from the registration requirements,³⁶⁸ the Commission's view is that the pre-existing resale restrictions continue to apply to the newly issued Rule 145 stock.³⁶⁹ The Commission, however, does permit tacking³⁷⁰ in such instances.³⁷¹ Again, this raises the possibility of multiple limitations on resale. Assume, for example, that an affiliate of an acquired company holds securities that are subject to the resale limitations of Rule 147 and that these securities are exchanged in a Rule 145 transaction, which transaction is exempt from registration under section 3(a)(10). The securities received in the Rule 145 transaction continue to be subject to the resale limitations of Rule 147(e) and, because of the affiliate status of the selling shareholder, are subject also to the resale limitations imposed by Rule 145(c).

H. *Resales of Rule 145 Stock by Control Persons of the Acquiring Company*

To complete this discussion, mention should be made of the limitations applicable to the resale of Rule 145 stock held by control persons of the acquiring company ("acquiring company control persons"). Generally, for the purposes of section 2(11) of the 1933 Act,³⁷² a control person is included in the definition of "issuer."³⁷³ Accordingly, if an acquiring company control person publicly sells any acquiring company stock, including Rule 145 stock, through, for example, a broker, the broker is selling for an "issuer." Both the broker, who is then considered an underwriter, since he is selling for an issuer in connection with a distribution, and the control person, who is considered an issuer, lose their

Release No. 5463, Part IV, Illustration A, Question A-4, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-7 to 3067-8 (Feb. 28, 1974) (securities previously acquired in a private offering).

367. See *supra* notes 239-82 and accompanying text.

368. See *supra* notes 142-72 and accompanying text.

369. See, e.g., Convergent Technologies, Inc., SEC No-Action Letter (available Dec. 29, 1986) (LEXIS, Fedsec library, NoAct file); CommerceAmerica Corp., SEC No-Action Letter (available Dec. 16, 1985) (LEXIS, Fedsec library, NoAct file); Oracle Corp., SEC No-Action Letter (available June 17, 1985) (LEXIS, Fedsec library, NoAct file); Federated Guar. Life Ins. Co., SEC No-Action Letter (available Apr. 21, 1983) (LEXIS, Fedsec library, NoAct file).

370. See *supra* note 277 and accompanying text.

371. See, e.g., Convergent Technologies, Inc., SEC No-Action Letter (available Dec. 29, 1986) (LEXIS, Fedsec library, NoAct file); Metheus Dev. Partners, SEC No-Action Letter (available March 27, 1985) (LEXIS, Fedsec library, NoAct file); Federated Guar. Life Ins. Co., SEC No-Action Letter (available Apr. 21, 1983) (LEXIS, Fedsec library, NoAct file). Thus, in determining whether a proposed sale of such Rule 145 stock meets the resale requirements of Rule 144, which may be one method to satisfy the preexisting restrictions, the Rule 144(d) holding period includes the time prior to the Rule 145 transaction that the shareholder owned the restricted securities and the time the shareholder held the new Rule 145 stock.

372. 15 U.S.C. § 77b(11) (1982) (defining "underwriter").

373. See 15 U.S.C. § 77b(11) (1982).

section 4(1) exemptions and thus are subject to the registration requirements of the 1933 Act.³⁷⁴

The options available for sale of Rule 145 stock by an acquiring company control person are essentially the same as those available to any controlling shareholder selling non-Rule 145 stock.³⁷⁵ The Commission has concluded, however, that resales of Rule 145 stock by such control shareholders cannot be made under Rule 145(d),³⁷⁶ although often there may be little difference between the requirements of Rule 144 and Rule 145(d).

III. CONCLUDING ANALYSIS

It is easy to criticize Rule 145. For example, one is able to find irreconcilable Commission interpretations of the Rule, such as the Commission's position that a change *from* a corporation *to* a Massachusetts business trust is within the change-in-domicile exception, while a change *to* a corporation *from* a Massachusetts business trust is not within the change-in-domicile exception.³⁷⁷ Also for example, the staff gave inconsistent answers to the question whether an offer was involved when a cash tender offer was announced in connection with a stock-for-stock merger.³⁷⁸

In addition to inconsistencies, a number of the Commission's interpretations of Rule 145 simply are unsound. For example, the definition of underwriter in Rule 145(c)³⁷⁹ and the Commission's one-percent rule³⁸⁰ are overly broad, imposing unjustified limitations on the freedom to resell Rule 145 stock.³⁸¹ The Commission also incorrectly concludes that a merger interposing a holding company between the operating company

374. T. Hazen, *supra* note 352, at 147-49. For discussions of sales by control persons, see L. Loss, *supra* note 3, at 556-57.

Securities held by affiliates of the acquiring company may be the subject of multiple limitations on resale. For example, if the Rule 145 transaction were effectuated pursuant to the exemption provided by Rule 147, resales would be limited because of the control status of the acquiring company control person and because of the resale limitations of Rule 147(e).

375. An acquiring company control person may sell pursuant to a registration statement, pursuant to the intrastate exemption provided by § 3(a)(11), see Exemption for Local Offerings from Registration, Securities Act Release No. 33-4434, 1 Fed. Sec. L. Rep. (CCH) ¶ 2274, at 2609 (Dec. 6, 1961), pursuant to Rule 144, see 17 C.F.R. § 230.144 (1987) (exemption for small sales by a controlling shareholder), or privately, see *The Section 4(1 1/2) Phenomenon*, *supra* note 267, at 1976-77.

376. See Division of Corporation Finance's Interpretations of Rule 145 and Related Matters, Securities Act Release No. 5463, Part IV, Illustration A, Question A-1, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-7 (Feb. 28, 1974).

377. See *supra* notes 43-45 and accompanying text.

378. See *supra* notes 189-91 and accompanying text.

379. 17 C.F.R. § 230.145(c) (1987).

380. See *supra* notes 307-27 and accompanying text.

381. See *supra* notes 248-55 and accompanying text; see also *supra* notes 313-28 (discussing problems arising from use of the one-percent rule).

and its shareholders necessarily involves a sale of securities.³⁸² It is also unsound conceptually for the Commission to conclude that a spin-off involves a sale of securities to nonvoting shareholders³⁸³ and for the Commission to conclude that a sale of assets by an acquired company in exchange for stock of the acquiring company involves a sale of stock only if the stock is distributed to the shareholders of the acquired company.³⁸⁴

Rule 145 also has been plagued by the breakdown of the categories delineated in section (a) of the Rule. Most apparently, the change-in-domicile exception in Rule 145(a)(2) has been interpreted to include transactions that do not fit the language of the exception.³⁸⁵ Furthermore, as demonstrated by the preceding discussion, none of the Rule 145(a) categories can be relied upon in all instances. Rather, one often is required to engage in additional analyses before determining whether an amalgamation or a reclassification involves a sale of securities to the shareholders of the acquired company.³⁸⁶

The Commission also is subject to criticism for its occasional reliance upon conceptually indefensible, pragmatic solutions to Rule 145 problems. For example, in a spin-off situation that, under the Commission's interpretations, would involve a sale, the Commission concluded that no registration or applicable exemption is required as long as the transaction is accompanied by a 1934 Act proxy statement and the spun-off company becomes subject to the reporting requirements of the 1934 Act.³⁸⁷ Although pragmatically one may conclude that there is no need for additional disclosure in such instances, such a result is entirely inconsistent with the 1933 Act. If the transaction is a sale, registration or an exemption from registration is required. Furthermore, the existence of the proxy statement and the company's reporting requirements are irrelevant to the presence of a sale under the 1933 Act.

To address these problems, the Commission should substantially revise Rule 145. In connection with this undertaking, the Commission needs to recognize that the 1933 Act provides no basis for conceptual distinctions between the amalgamations and recapitalizations included in Rule 145 and other transactions outside Rule 145. Thus, the criteria for determining the existence of a sale should be the same in Rule 145 transactions and non-Rule 145 transactions. Similarly, the rules regarding the obligation to register a transaction, the availability of exemptions from the registration requirements and the limitations on resales should be the same for Rule 145 transactions and non-Rule 145 transactions.

382. For a discussion of the Commission's position in this regard, see *supra* notes 77-88 and accompanying text.

383. See *supra* notes 104-05 and accompanying text.

384. See *supra* notes 108-13 and accompanying text.

385. See *supra* notes 34-38 and accompanying text.

386. For example, see *supra* notes 21-24 and accompanying text which suggests that reverse stock splits may involve sales in certain instances, notwithstanding language in Rule 145(a)(1) to the contrary.

387. See *supra* notes 89-96 and accompanying text.

A need exists, however, for special administrative accommodations for Rule 145 transactions. Thus, for example, it is entirely appropriate for the Commission to provide safe harbor provisions, such as Rule 145(b),³⁸⁸ for announcement of a Rule 145 transaction, and to provide a special registration form, such as Form S-4,³⁸⁹ for the registration of Rule 145 transactions.

With regard to more specific recommendations, this Author suggests that the Commission abandon its attempt in Rule 145 to establish discrete and absolute categories of sale and no-sale transactions. Instead, Rule 145(a) should state that a reclassification, merger, consolidation or transfer of assets involves a sale of securities to voting shareholders who receive stock in the transaction only if the transaction results in a material change in the corporation or in shareholders' rights. Applying this standard, the Rule then should list certain alterations that usually do or do not result in a sale. For example, it would seem appropriate to state that in most circumstances reclassifications involving only a stock split, reverse stock split or change in par value of securities would not involve a sale, since such transactions usually involve only immaterial changes in shareholders' rights. As another example, it also seems appropriate to state that reclassifications involving any material change in dividend, liquidation, redemption or conversion rights in most circumstances would involve a sale, because they involve material changes in fundamental shareholder rights.

Although such an approach at first appears to destroy the certainty of Rule 145(a), the opposite, in fact, results. As described earlier, the categories of Rule 145(a) never have been absolute, and the apparent attempt by the Commission in Rule 145(a) to treat them as such has caused confusion and disingenuous analyses. The Commission should admit this and change the rule to allow the definition of a sale to develop from a sound, although somewhat general, conceptual basis.

In addition to the problem of defining sale, it is clear that the resale provision of Rule 145³⁹⁰ and the one-percent rule³⁹¹ are unjustifiably restrictive³⁹² and accordingly require substantial adjustment. This, however, forms one part of a larger problem that the Commission needs to treat on a unified basis.

Anytime a shareholder proposes to resell securities acquired from an issuer in a registered or exempt transaction, the question arises whether such selling shareholder is an underwriter.³⁹³ Statutorily, such a reselling shareholder is an underwriter if he purchased the shares with a view

388. See 17 C.F.R. § 230.145(b) (1987).

389. 17 C.F.R. § 239.25 (1987).

390. See 17 C.F.R. § 230.145(d) (1987).

391. See *supra* notes 307-11 and accompanying text.

392. See *supra* notes 248-55, 327-28 and accompanying text.

393. See 15 U.S.C. § 77b(11) (1982) (definition of underwriter).

to distribution.³⁹⁴

The application of this definition, however, has resulted in confusion and inconsistency. For example, Rule 145(c)³⁹⁵ subjects any affiliate of an acquired company to the possibility of underwriter status,³⁹⁶ while the one-percent rule subjects persons who purchase one-percent of a Rule 145 offering to underwriter status.³⁹⁷ In other instances, commentators suggest that persons receiving ten percent of an issue might be considered underwriters.³⁹⁸ Another commentator concludes, after examining Commission no-action letters, that a different test of underwriter status applies to resales of securities acquired in section 3(a)(9) transactions.³⁹⁹

The Commission needs to develop a sensible and consistent approach to resales generally and, as a part of that, to resales of Rule 145 stock. In that regard this Article offers the following observations and suggestions. First, there is no theoretical basis for treating resales differently merely because they may or may not involve Rule 145 stock. The statute defines an underwriter as one who purchases with a view to distribution,⁴⁰⁰ and the fact that the selling shareholder originally purchased securities in a Rule 145 transaction is essentially irrelevant to the matter.

Second, in determining whether such reselling shareholders are underwriters, it is appropriate for the Commission to rely upon traditional criteria. Thus, the Commission should focus on the size of the shareholder's purchase or proposed resale, the holding period and the availability of information about the issuer.

Third, the Commission must take great care, if it chooses to address this problem, to ensure a result that is balanced and to avoid its propensity for overkill. The strong need for free transferability of stock in the hands of shareholders, the registration requirements imposed on sales of securities by control persons⁴⁰¹ and disclosure requirements of the antifraud provisions⁴⁰² make an expansive definition of underwriter inappropriate.

Finally, any change in the rules regarding resales should be promulgated clearly, intelligibly and accessibly. Presently, there is no clear

394. *Id.*

395. 17 C.F.R. § 230.145(c) (1987).

396. For the text of Rule 145(c), defining underwriter, see *supra* note 1.

397. See *supra* notes 307-12 and accompanying text.

398. See *supra* note 247 and accompanying text.

399. See Hicks, *Recapitalizations Under Section 3(a)(9) of the Securities Act of 1933*, 61 Va. L. Rev. 1057, 1096-1106 (1975).

400. See 15 U.S.C. § 77b(11) (1982).

401. Sales of securities held by control persons often are subject to the registration provisions of the 1933 Act. See *supra* notes 372-75 and accompanying text. As a result, such sales may involve disclosures by the selling shareholder either to meet the prospectus delivery requirements, see 15 U.S.C. § 77e(b) (1982), the requirements of an exemption, see *supra* notes 144-64 and accompanying text, or the antifraud provisions of the 1933 Act, see *supra* note 22. There is, therefore, less need for an expansive definition of underwriter, since sales are often subject to other requirements that insure disclosure, especially when sales by larger shareholders are involved.

402. See *supra* note 22.

statement defining when one becomes an underwriter, and the multiple no-action letters, rules and releases dealing with this matter are difficult to find and often impossible to reconcile. Many of the problems with Rule 145 are due, at least in part, to the Commission's excessive reliance on no-action letters as the principal development vehicle for Rule 145. The Commission has issued approximately seven hundred no-action letters interpreting Rule 145. With such a volume of letters written over a protracted period of time by various members of the staff with varying abilities, views and available time, it is not surprising that inconsistent interpretations have developed.

More importantly, however, by acting through no-action letters, the Commission has eliminated much of the meaningful input it otherwise might receive and decreased its accountability for bad decisions. For example, had the one-percent rule been promulgated as an amendment to Rule 145 and put out for comment, it surely would have drawn fire from commentators. Certainly, someone would have argued that it made no sense to impose such a constraint in addition to the already overly restrictive definition of underwriter in Rule 145(c).⁴⁰³ This input and pressure for sensible decisions was lost when the Commission imposed the one-percent rule through no-action letters.

There is also the question of administrative resource allocation. If one assumes that each no-action letter required a total of twenty lawyer hours to analyze the letter, communicate with the requesting counsel, research the problem, draft a response, provide for review by the appropriate branch chief or other superior of the staff member in charge of the matter, then the total Commission time on all Rule 145 no-action letters would be approximately fourteen-thousand hours.⁴⁰⁴ If the average work year is two-thousand hours,⁴⁰⁵ the Commission has spent the equivalent of seven years writing Rule 145 no-action letters. Even if each letter required only ten lawyer hours, which would mean that a mere three-and-one-half lawyer years have been spent on the Rule, the quality of the Rule is something less than one might expect.

The Commission can solve this problem by continuing to issue no-action letters, but only on a selective basis. These letters are helpful to persons with particular problems and are generally beneficial as an indication of Commission policy. The Commission should, however, limit future no-action letters to instances that will provide new guidance and should refuse to respond in instances where the attorneys involved merely are seeking comfort for established theories or analyses.⁴⁰⁶

403. See 17 C.F.R. § 230.145(c) (1987); *supra* note 1 for text of Rule 145.

404. This represents 700 no-action letters at 20 hours per letter.

405. This represents 50 weeks per year at 40 hours per week.

406. It appears that the Commission is starting to refuse to issue no-action responses in certain instances where the staff had previously responded. See, e.g., Lazard Freres Inst. Fund, SEC No-Action Letter (available Feb. 26, 1987) (LEXIS, Fedsec library, NoAct file) (request involving change-in-domicile exception); National Sec. Funds, SEC No-Action Letter (available June 23, 1986) (LEXIS, Fedsec library, NoAct file) (same).

In addition, the Commission should rely more upon interpretative releases and amendments to the Rule itself. This would permit more systematic revision and development of the Rule and would allow more input from persons outside the Commission who deal with the Rule on a continuing basis. It would also help resolve the interpretative inconsistencies that develop when different staffmembers respond to no-action inquiries and would force the Commission to test its new theories against contrary opinion.

In summary, the current state of Rule 145 interpretation is confusing and inconsistent. The Commission should remedy the situation by amending the Rule to replace the absolute categories of sale and no-sale transactions and, instead, define "sale" to include only a transaction that results in a material change to the corporation or to the shareholders' rights. The Commission also should develop a consistent approach for dealing with resales. Specifically, it should use the same criteria for defining underwriter for Rule 145 purposes as are used to define underwriter in other contexts. Finally, future development of Rule 145 should rely more on interpretive releases and amendments to the Rule itself and less on no-action letters.

